Faculty of Law
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THE BEST INTERESTS OF THE CHILD IN HUMAN RIGHTS PRACTICE: AN ANALYSIS OF DOMESTIC, EUROPEAN AND INTERNATIONAL JURISPRUDENCE

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DOCTORAL DISSERTATION

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ABSTRACT

According to Article 3(1) of the United Nations Convention on the Rights of the Child (CRC), the best interests of the child shall be a primary consideration in all actions concerning children. The best interests of the child is a central but indeterminate concept. After its inclusion in the CRC in 1989, considering it became a human rights obligation.

This thesis analyses the concept of the best interests of the child in domestic, European and international human rights practice. It consists of four peer-reviewed articles and a summary. Building on each article's arguments regarding the concept of the best interests of the child in human rights practice, the summary extends key themes and discusses the implications of the findings.

This thesis enriches our knowledge of how the best interests concept is understood and used in human rights practice. Its starting point is the interaction between the concept of the best interests of the child and children's rights, with the analysis responding to a broader question of the interaction and dialogue between different systems for the protection of human rights. The thesis offers new, systematically collected data on the nature and functioning of the best interests concept in human rights practice at the domestic, European and international levels and discusses the major reasons underlying the identified problems. Methodologically, it relies on systematic case studies and comparison and employs tools of doctrinal research to analyse the findings.

Article I, '"In All Actions Concerning Children"? Best Interests of the Child in the Case Law of the Supreme Administrative Court of Finland', demonstrates that the Supreme Administrative Court of Finland considers the best interests of the child in a selective manner: it tends to consider best interests in areas traditionally associated with children's rights but does not consider them sufficiently in other areas. Article II, 'A comparison of child protection and immigration jurisprudence of the European Court of Human Rights: what role for the best interests of the child?', compares the use of the best interests concept in child protection and immigration cases of the European Court of Human Rights (ECtHR). Even though the ECtHR regularly refers to best interests in its cases concerning children, unjustified differences exist between the case groups in the assessment of family unity, the child's age and the child's views. The article concludes that the ECtHR's approach in immigration cases is problematic. Article III, 'Understanding the Best Interests of the Child as a Procedural Obligation: the Example of the European Court of Human Rights', suggests a procedural approach to best interests as a remedy to the inconsistent application of the concept in the different case groups detected in Article II. The article critically analyses the views of the Committee

on the Rights of the Child and categorises three layers of the ECtHR's procedural approach to best interests. Article IV, 'A Focus on Domestic Structures: Best Interests of the Child in the Concluding Observations of the UN Committee on the Rights of the Child', establishes that instead of attempting to define the best interests concept in its concluding observations, the Committee on the Rights of the Child focuses on structures that advance the implementation of best interests.

Together, the articles illustrate the problems of an outcome-focused understanding of the best interests of the child. These issues are reflected in the inconsistencies of human rights practice; the best interests of the child are not systematically taken into account in human rights practice as required by Article 3(1) CRC. This study found unjustified differences between different fields of law, which is problematic from the perspective of children's rights, especially concerning non-discrimination.

The thesis suggests that the application of an outcome-focused understanding of the concept of the best interests of the child is complicated by the concept's purpose of maximising children's rights and by the ambiguity of the criteria under which the child's best interests can be limited. The thesis, therefore, uses the framework of positive and negative obligations to demonstrate that the current practice of accommodating best interests with other interests and rights – balancing – is obscure and that, consequently, best interests are easily disregarded. The thesis suggests that if Article 3(1) CRC is used as a yardstick to measure the outcome of a decision, the legal content of Article 3(1) should be defined in relation to the case at hand, after which the criteria for limiting human rights should be applied. The thesis further argues that relying on different presumptions in similar legal questions may lead to discriminatory outcomes.

The thesis also develops the idea of Article 3(1) CRC as a procedural obligation. Relying on Article 3(1) as a procedural obligation means that in cases concerning children, courts would attend to whether the best interests of the child have been considered, the grounds of the assessment explained and procedural requirements, such as obtaining the child's views, followed. The substantive assessment would be expressed in terms of the rights of the child. The thesis proposes that a procedural approach and focus on structures that advance children's rights in general could more effectively safeguard the best interests of the child than an outcome-focused approach.

FINNISH ABSTRACT / TIIVISTELMÄ

YK:n lapsen oikeuksien sopimuksen (LOS) 3(1) artiklan mukaan kaikissa lapsia koskevissa toimissa on ensisijaisesti otettava huomioon lapsen etu. Lapsen etu on keskeinen mutta epämääräinen käsite, jonka huomioimisesta tuli ihmisoikeusvelvoite, kun se sisällytettiin lapsen oikeuksien sopimukseen. Tämä väitöskirja analysoi lapsen edun käsitettä kotimaisessa, eurooppalaisessa ja kansainvälisessä ihmisoikeuksia koskevassa oikeuskäytännössä. Väitöskirja koostuu neljästä vertaisarvioidusta artikkelista sekä yhteenvedosta, joka rakentuu artikkelien johtopäätöksille ja pohtii tulosten laajempaa merkitystä.

Väitöskirja tuottaa uutta tietoa siitä, miten lapsen edun käsite ymmärretään ja miten sitä käytetään ihmisoikeuksia koskevassa kotimaisessa, eurooppalaisessa ja kansainvälisessä oikeuskäytännössä. Väitöskirjan lähtökohta on vuorovaikutus lapsen edun ja lapsen oikeuksien välillä. Analyysi kytkeytyy laajempaan kysymykseen siitä, miten ihmisoikeuksien suojajärjestelmät ovat vuorovaikutuksessa keskenään. Väitöskirjan metodi perustuu oikeuskäytännön systemaattiseen tarkasteluun, vertailuun sekä tulosten lainopilliseen analyysiin.

Ensimmäinen artikkeli osoittaa, että Suomen korkein hallinto-oikeus huomioi lapsen etua valikoivasti: lapsen etu otetaan yleensä huomioon lasten oikeuksiin perinteisesti yhdistetyillä alueilla, mutta muilla alueilla lapsen edun huomiointi ei ole riittävää. Toinen artikkeli vertailee sitä, miten Euroopan ihmisoikeustuomioistuin (EIT) käyttää lapsen edun käsitettä lastensuojelu- ja ulkomaalaisasioissa. Vaikka EIT viittaakin usein lapsen etuun, lastensuojelu- ja ulkomaalaisasioiden välillä on merkittäviä eroja suhtautumisessa perheen yhtenäisyyteen, lapsen ikään ja lapsen näkemyksiin. Artikkelin johtopäätös on, että EIT:n lähestymistapa ulkomaalaisasioissa on lapsen oikeuksien kannalta ongelmallinen. Kolmas artikkeli esittää prosessuaalista lähestymistapaa lapsen etuun ratkaisuksi toisessa artikkelissa havaittuihin asiaryhmien välisiin eroihin ja havainnollistaa väitettä EIT:n oikeuskäytännöllä. Neljäs artikkeli osoittaa, että YK:n lapsen oikeuksien komitea keskittyy loppupäätelmissään lapsen edun määrittelemisen sijaan rakenteisiin, jotka edistävät lapsen edun ja yleisesti lasten oikeuksien toteutumista.

Kokonaisuutena väitöskirja tuo esille ongelmia lapsen edun toteutumisessa; lapsen etua ei systemaattisesti oteta huomioon LOS 3(1) artiklan edellyttämällä tavalla. Tutkimuksessa tuli esille eri asiaryhmien välisiä perusteettomia eroja, jotka ovat ongelmallisia lasten oikeuksien ja etenkin syrjinnän kiellon näkökulmasta. Väitöskirja esittää, että jos lapsen etua käytetään ratkaisun sisällöllisenä mittapuuna, lapsen edun sisältö tietyssä tilanteessa pitäisi määritellä lapsen oikeuksien kautta ja tämän jälkeen soveltaa ihmisoikeuksien rajoitusedellytyksiä lapsen edun rajoittamiseen. Väitöskirja myös esittää, että samanlaisissa oikeudellisissa

kysymyksissä ei pitäisi käyttää erilaisia oletuksia esimerkiksi siitä, onko lapsen etu olla vanhempiensa kanssa vai ei, koska vaarana on syrjivään lopputulokseen päätyminen.

Väitöskirja esittää, että prosessuaalinen lähestymistapa ja lasten oikeuksien toteutumista edistäviin rakenteisiin keskittyminen turvaavat tehokkaammin lapsen etua kuin lapsen edun ymmärtäminen sisällöllisenä velvoitteena. Lapsen edun huomioimisen ymmärtäminen prosessuaalisena velvoitteena tarkoittaa, että tuomioistuimen pitää kiinnittää lapsia koskevissa asioissa huomiota siihen, onko lapsen etua harkittu, onko arvioinnin perusteita avattu sekä onko prosessuaalisia velvoitteita (esimerkiksi lapsen mielipiteen selvittäminen) noudatettu. Ihmisoikeusvelvoitteiden kanssa sopusoinnussa olevaan lopputulokseen päätyminen kuitenkin edellyttää sisällöllisen harkinnan ilmaisemista lapsen oikeuksien kautta.

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The topic reveals even less about the process of writing a thesis. I have been fortunate to receive the support of many people during this journey. Firstly, I would like to express my gratitude to my supervisor, Professor Tuomas Ojanen, for support and collegiality along the way. Thank you, Tuomas, for helping me in various ways – intellectual and practical – while also encouraging me to stand on my own feet as a researcher. You have often found new angles to my work when I have felt at an impasse, and your dry sense of humour has helped me put things in perspective. By now, I am quite familiar with your subtle way of pushing me forward and then refusing to accept thanks for it. Observing how you approach your own academic work has been valuable; I have learned to judge what is more and less important and focus on the first – a skill I am still practicing but becoming better at. Thank you for everything.

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
CCPR	Human Rights Committee
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMW Committee	United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
CoE	Council of Europe
Committee	United Nations Committee on the Rights of the Child
COs	concluding observations (of United Nations treaty bodies)
CRC	United Nations Convention on the Rights of the Child
CRC Committee	United Nations Committee on the Rights of the Child
CRPD	United Nations Convention on the Rights of Persons with Disabilities
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights]
ECtHR	European Court of Human Rights
ESC rights	economic, social and cultural rights
EU	European Union
GC14	United Nations Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)
GMIs	general measures of implementation of the United Nations Convention on the Rights of the Child
HUDOC	Human Rights Documentation
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights

OP3	Optional Protocol to the Convention on the Rights of the Child on a communications procedure
SAC	Supreme Administrative Court of Finland
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

LIST OF ORIGINAL PUBLICATIONS

This thesis consists of the following original publications:

I '"In All Actions Concerning Children"? Best Interests of the Child in the Case Law of the Supreme Administrative Court of Finland' (2016) 24(1) The International Journal of Children's Rights 155–184

II 'A comparison of child protection and immigration jurisprudence of the European Court of Human Rights: what role for the best interests of the child?' (2019) 31(3) Child and Family Law Quarterly 249–268, republished in (2019) (4) International Family Law Journal 230–248

III 'Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights' (2020) 20(4) Human Rights Law Review 745–768

IV 'A Focus on Domestic Structures: Best Interests of the Child in the Concluding Observations of the UN Committee on the Rights of the Child' (2020) 38(2) Nordic Journal of Human Rights 100–121

1 INTRODUCTION

1.1 The elephant in the room

When Finland repatriated six Finnish children and two mothers from the Syrian al-Hol camps in December 2020, a central justification of the responsible ministry was that the best interests of the children have to be prioritised.[1] Earlier the same year, the United Nations Committee on the Rights of the Child (CRC Committee) argued in its statement concerning the Covid-19 pandemic that 'States should ensure that responses to the pandemic, including restrictions and decisions on allocation of resources, reflect the principle of the best interests of the child'.[2] The previous autumn, Swedish climate activist Greta Thunberg and 15 other young people submitted a complaint to the CRC Committee against several states, claiming that the respondent states have failed to take their best interests as a primary consideration in the states' climate actions.[3] Best interests were also invoked in the climate change-related application six Portuguese children and young adults filed in September 2020 to the European Court of Human Rights (ECtHR).[4]

Children have rights as human beings, but they have also been guaranteed child-specific rights. One of these special rights is the best interests of the child, arguably the most well-known concept in the children's rights framework. In international human rights law, children are the only group whose 'best interests' are protected this way.[5] The idea behind the concept is that children are in a disadvantaged position compared to adults and thus need special protection to ensure that their interests are not overridden or conflated with other interests in decision-making.[6] In other words, children 'are located within subordinate power structures (families, schools, and other institutions), in which they are invariably

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1 'Finland repatriates eight citizens from Syria' (YLE, 20 December 2020) <https://yle.fi/uutiset/osasto/news/finland_repatriates_eight_citizens_from_syria/11707855> accessed 21 January 2021.

2 'CRC COVID-19 Statement' (Committee on the Rights of the Child, 8 April 2020), para 1.

3 *Sacchi et al v Argentina et al* (Communication to the Committee on the Rights of the Child, 23 September 2019), paras 301-308.

4 *Cláudia Duarte Agostinho and others v Portugal and 32 other states*, App no 39371/20, communicated 13 November 2020.

5 Stalford argues that extending the concept to decision-making contexts other than children is not advisable, see Helen Stalford, 'The broader relevance of features of children's rights law: the "best interests of the child" principle' in Eva Brems, Ellen Desmet and Wouten Vandenhole (eds), *Children's Rights Law in the Global Human Rights Landscape Isolation, inspiration, integration?* (Routledge 2017).

6 Ibid 40.

perceived to have incomplete agency'.[7] The concept itself is old,[8] but it became a human rights concept when it was included in the UN Convention on the Rights of the Child (CRC), a widely ratified global convention guaranteeing children's human rights. According to Article 3(1) of the CRC,

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[9]

The best interests concept has been called '[t]he primary focus of the Convention'.[10] It has even been considered customary international law.[11] The CRC Committee, the monitoring body of the CRC, has elevated Article 3 as one of the CRC's 'general principles' that have special importance in the interpretation of the

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7 John Eekelaar and John Tobin, 'Article 3: The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 76.

8 In England and Wales, the 'paramountcy principle' or 'welfare principle' has a strong status in family law proceedings, with section 1 of the Children Act 1989 providing that 'When a court determines any question with respect to (a) the upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration'. For a critique of the paramountcy principle, see eg Helen Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 Current Legal Problems 267. Note that the scope of the welfare principle is narrower than that of Article 3(1) CRC despite the paramount status accorded to the child's welfare. The concept also has a long history in the United States, see Lynne Marie Kohm, 'Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence' (2008) 10 Journal of Law & Family Studies 337.

9 In addition to Article 3, best interests are mentioned in CRC Articles 9 (separation from parents), 10 (family reunification), 18 (parental responsibilities), 20 (deprivation of family environment and alternative care), 21 (adoption), 37(c) (separation from adults in detention) and 40(2)(b) (children in conflict with the law), as well as the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography (preamble and Article 8) and in the Optional Protocol to the Convention on a communications procedure (preamble and Articles 2 and 3). After the CRC, the best interests concept has appeared in, for example, the UN Convention on the Rights of Persons with Disabilities (CRPD), where protection of best interests is secured for disabled children in Articles 7 and 23; the African Charter on the Rights and Welfare of the Child (ACRWC) Article 4; and Article 24(2) of the Charter of Fundamental Rights of the European Union (CFREU), which largely follows the wording of Article 3(1) CRC. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also safeguards the interests of children (in Articles 5 and 6) but, as Cantwell has noted, the concept appears in family law matters only and not as a broader concept; see Nigel Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill 2017) 62-63.

10 Thomas Hammarberg, 'The UN Convention on the Rights of the Child – And How to Make It Work' (1990) 12 Human Rights Quarterly 97, 99.

11 Geraldine Van Bueren, 'Children's Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, Oxford University Press 2018) 331; see also Meda Couzens, 'The application of the United Nations Convention on the Rights of the Child by national courts' (unpublished doctoral thesis, Leiden University 2019) 214; René Provost, 'Judging in Splendid Isolation' (2008) 56 The American Journal of Comparative Law 125, 137.

whole convention.[12] As the formulation of Article 3(1) CRC indicates, the obligation to consider best interests is general and broad in nature as it extends to all actions concerning children and contains no exceptions. The CRC is not the only source containing an obligation to consider best interests, but it is usually considered the most important international legal source addressing children's rights.[13]

The best interests of the child are invoked in a breadth of situations. But what do best interests really mean? Does the concept make a difference for children? The concept is controversial: it both aims to guarantee that children are not disregarded in decision-making and gives adults the power to 'impose a course of action on minors on the basis of their assessment of the minors' best interests'.[14] The first major criticism of the concept relates to the content or meaning of the best interests of the child,[15] which several scholars consider to be exceptionally indeterminate.[16] The most well-known indeterminacy criticisms predate the CRC and concern the dangers of relying on the principle in custody disputes.[17] Archard has identified the three following types of indeterminacy-related criticism of the concept: that it leaves an unacceptable judicial discretion to judges, that discretion is exercised in an arbitrary or subjective manner, and that discretion allows judges' biases to affect the decision-making.[18] However, others have argued that indeterminacy criticisms fail to take into account the rest of the CRC and the need to interpret the concept of the best interests of the child in accordance with general treaty interpretation rules.[19]

The problems associated with the concept are not related to its indeterminate nature alone. The second major type of criticism concerns the problems of weighing best interests against other considerations.[20] It has been argued that Article 3(1)

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12 Hanson and Lundy have pointed out, following a remark by Nigel Cantwell, that although Article 3 as a whole is listed as one of the general principles, only the first paragraph of the Article has the status of a general principle. Karl Hanson and Laura Lundy, 'Does Exactly What it Says on the Tin?' (2017) 25 The International Journal of Children's Rights 285, 292.

13 See eg Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009) 308.

14 John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 International Journal of Law and the Family 42, 43.

15 David Archard, 'Children, adults, best interests and rights' (2013) 13 Medical Law International 55, 56.

16 Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 International Journal of Law, Policy and the Family 1.

17 Jon Elster, 'Solomonic Judgments: Against the Best Interest of the Child' (1987) 54 The University of Chicago Law Review 1; Robert Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemporary Problems 226. Mnookin submits that in addition to the indeterminate nature of determining what is best for a child, determining what is 'least detrimental' is equally speculative. See ibid 229.

18 Archard, 'Children, adults, best interests and rights' 57-58. Archard notes that these critiques stem not only from the indeterminacy of best interests as such but from the indeterminacy of the concept regarding moral disagreement, which damages the decision-making process.

19 See eg Jason Pobjoy, *The Child in International Refugee Law* (Cambridge University Press 2017) 228.

20 Archard, 'Children, adults, best interests and rights' 59-60.

does not belong to the human rights framework. The concept has been considered paternalistic,[21] and the paternalism is exacerbated by the fact that children cannot exercise political power to challenge political decisions concerning them.[22] It has also been contended that the concept can be used to justify outcomes that breach children's rights. Best interests can be relied on both as a main rule, to justify a result that is in accordance with the child's right, and as an exception, to justify a limitation of that right.[23] There is controversy regarding whether Article 3(1) is useful, empty, or perhaps even harmful and no consensus on whether it contains a right at all.

Indeed, in the CRC, Article 3(1) stands out in that it does not contain the word 'right'.[24] Cantwell, a leading critic of the concept, argues that 'the prominent role now assigned to the "best interests of the child" is mistaken, even dangerous, in a context where children have human rights'.[25] Cantwell considers the concept unnecessary because there is no assumption for other groups of humans that protecting their rights can lead to outcomes detrimental for them or their interests[26] and dangerous because referring to best interests may distract decision-makers from conceptualising the situation in terms of children's human rights.[27] The CRC Committee, too, has recognised that the concept's flexibility opens up possibilities for manipulative use of the concept.[28] The concept lacks transparency, which makes its flexibility even more problematic.[29] The unease of the international child rights community with the best interests concept is captured by Jane Fortin who

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21 Michael Freeman, 'Article 3: The Best Interests of the Child' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2007) 50-51.

22 Eekelaar and Tobin, 'Article 3: The Best Interests of the Child' 76.

23 Grover, for instance, has criticised the fact that Optional Protocol to the Convention on the Rights of the Child on a communications procedure (Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/66/138 of 19 December 2011, entered into force on 14 April 2014, abbreviated as OP3) lists best interests both as a guiding principle in handling individual communications (Article 2 OP3) and as a ground for declining to examine any communication if the CRC Committee considers the communication as not in the child's best interests (Article 3 OP3), even though it is unclear how best interests are defined. See Sonja C Grover, *Children Defending their Human Rights Under the CRC Communications Procedure* (Springer 2015) 109-113.

24 Archard, 'Children, adults, best interests and rights' 61. Cf. the title of the General Comment on Article 3(1) (Committee on the Rights of the Child, 'General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration' (art. 3, para. 1) 29 May 2013 CRC/C/GC/14, abbreviated as GC14).

25 Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' 62.

26 Ibid 69.

27 Ibid 65.

28 See eg GC14, para 34. An additional type of criticism of the concept relates to the idea of international policymakers deciding how the best interests of the child should be interpreted, see Vanessa Pupavac, 'Misanthropy Without Borders: The International Children's Rights Regime' (2001) 25 Disasters 95.

29 Claire Fenton-Glynn, 'Children, parents and the European Court of Human Rights' (2019) European Human Rights Law Review 643, 647.

suggested in 2014 that how the best interests of the child interact with children's rights remains the elephant in the room and has to be tackled.[30]

The best interests concept has attracted attention in previous research. Freeman and Zermatten, among others, have analysed Article 3(1) and proposed different interpretations for the best interests concept.[31] Several authors have sought ways to interpret the concept consistently with children's rights. Eekelaar, for instance, introduces 'dynamic self-determinism', which reconciles the idea of furthering children's best interests with the CRC's idea of children as rights holders by integrating children's views in the assessment of their best interests.[32] However, the premises of dynamic self-determinism have been criticised, with Archard arguing that there is no inherent conflict between the idea of having rights and some element of paternalism or welfare. Instead, Archard sees a tension between the child's and adults' judgements of the child's best interests.[33] Others have recently emphasised the potential of the best interests concept. Pobjoy, for example, contends that Article 3(1) forms an independent source of protection for asylum-seeking children when interpreted together with the Refugee Convention,[34] and Bracken finds that it offers a basis for claims seeking legal recognition for same-sex parenting arrangements.[35] Some scholars have been more critical, including Kilkelly, who has suggested that Article 3(1) does not contain a right.[36] According to Archard, the idea of always maximising the welfare of children is implausible; instead, he endorses a milder '"interests" principle', in which 'the well-being of the child should be an independent consideration in, and a constraint upon, decision-making'.[37] In addition to studies analysing the concept itself, the use of the concept

30 Jane Fortin, 'Children's rights – flattering to deceive?' (2014) 26 Child and Family Law Quarterly 51, 63.

31 Freeman, 'Article 3: The Best Interests of the Child'; Jean Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 The International Journal of Children's Rights 483.

32 Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism'.

33 Archard, 'Children, adults, best interests and rights' 61-66. Fortin, too, argues that there is no inherent conflict between rights and welfare, see Jane Fortin, *Children's Rights and the Developing Law* (Law in Context, 3rd edn, Cambridge University Press 2009) 26. See also David Archard and Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17 International Journal of Children's Rights 1.

34 Pobjoy, *The Child in International Refugee Law* 196-203.

35 Lydia Bracken, *Same-Sex Parenting and the Best Interests Principle* (Cambridge University Press 2020).

36 Ursula Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' in Elaine E. Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child Best Interests, Welfare and Well-being* (Cambridge University Press 2016); see also Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?'.

37 Archard, 'Children, adults, best interests and rights' 55-56. Note that Archard refers here to 'welfare' and 'well-being', not to rights.

in case law has been examined in regional contexts, including the ECtHR,[38] in the European Union (EU) context[39] and in several national contexts,[40] including some fields of law in Finland.[41] Several studies have found that the reasoning related to best interests is frequently scarce and does not genuinely consider the child's circumstances.[42]

While a vast body of literature exists on different aspects of the concept of the best interests of the child, gaps remain. The discrepancy between the central status and criticism of the best interests concept calls for further scrutiny of the concept, and the relationship between best interests and rights requires clarification.

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38 Eg Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* (Bloomsbury Publishing 2017); Anette Faye Jacobsen, 'Children's Rights in the European Court of Human Rights – An Emerging Power Structure' (2016) 24 The International Journal of Children's Rights 548; Helen Keller and Corina Heri, 'Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights' (2015) 84 Nordic Journal of International Law 270; Mathieu Leloup, 'Some Reflections on the Principle of the Best Interests of the Child in European Expulsion Case Law' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights*, vol 10 (Intersentia 2018); Mathieu Leloup, 'The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency' (2019) 37 Netherlands Quarterly of Human Rights 50; Marit Skivenes and Karl Harald Søvig, 'Judicial Discretion and the Child's Best Interests: The European Court of Human Rights on Adoptions in Child Protection Cases' in Elaine E. Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child Best Interests, Welfare and Well-being* (Cambridge University Press 2016); Ciara Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?' (2015) 17 European Journal of Migration and Law 70.

39 Mark Klaassen and Peter Rodrigues, 'The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter' (2017) 19 European Journal of Migration and Law 191.

40 Eg Fabrice Langrognet, 'The Best Interests of the Child in French Deportation Case Law' (2018) 18 Human Rights Law Review 567; Jonathan Josefsson, 'Children's Rights to Asylum in the Swedish Migration Court of Appeal' (2017) 25 The International Journal of Children's Rights 85; Daan Beltman and others, 'The Legal Effect of Best-Interests-of-the-Child Reports in Judicial Migration Proceedings: A Qualitative Analysis of Five Cases' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill 2017); Marit Skivenes, 'Judging the Child's Best Interests: Rational Reasoning or Subjective Presumptions?' (2010) 53 Acta Sociologica 339.

41 Eg Virve-Maria Toivonen, *Lapsen oikeudet ja oikeusturva. Lastensuojeluasiat hallintotuomioistuimissa* (Alma Talent 2017) (on the best interests and the rights of the child in child welfare cases in administrative courts); Suvianna Hakalehto, 'Lapsen edun arviointi korkeimman oikeuden perheoikeudellisissa ratkaisuissa' (2016) Defensor Legis 427 (on the best interests of the child in family law cases of the Supreme Court); Suvianna Hakalehto and Katariina Sovela, 'Lapsen etu ja sen ensisijaisuus ulkomaalaisasioita koskevassa päätöksenteossa' in Heikki Kallio, Toomas Kotkas and Jaana Palander (eds), *Ulkomaalaisoikeus* (Alma Talent 2018) (best interests in migrant-related decision-making, including Supreme Administrative Court cases, published after the author's Article I); Reija Knuutila and Heta Heiskanen, 'Lapsen etu viranomaistoiminnassa: katsaus eräisiin Maahanmuuttoviraston viimeaikaisiin kielteisiin päätöksiin' (2014) 43 Oikeus 314 (best interests in certain negative decisions of the Finnish Immigration Service); Johanna Hiitola and Saara Pellander, 'The Alien Child's Best Interest Ignored: When Notions of Gendered Parenthood Meet Tightening Immigration Policies' (2019) 27 NORA – Nordic Journal of Feminist and Gender Research 245.

42 Eg Knuutila and Heiskanen, 'Lapsen etu viranomaistoiminnassa: katsaus eräisiin Maahanmuuttoviraston viimeaikaisiin kielteisiin päätöksiin'; Anna Lundberg, 'The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights' (2011) 3 Journal of Human Rights Practice 49; Skivenes, 'Judging the Child's Best Interests: Rational Reasoning or Subjective Presumptions?' 349. Skivenes, who analysed four judgments of the Norwegian Supreme Court, found significant variation in the evidence required, arguments offered and quality of the reasoning between judgments.

The CRC Committee has suggested a connection between best interests and human rights, but the relationship between the best interests of the child and the rights of the child, as well as other rights and interests, remains ambiguous and has not been thoroughly studied. In addition, accurate data are needed on the connotations and legal consequences that different actors attach to the concept in concrete situations where rights conflict. Several scholars have noted the gap between children's rights standards and their implementation in practice,[43] with the application of the best interests concept described as 'highly inconsistent'.[44] The loose wording of the concept allows numerous interpretations, underscoring the importance of following the jurisprudence of the actors who evoke best interests. What meanings of the concept are constructed in human rights practice and with what consequences? Although the concept's use in court argumentation has been studied in certain contexts, the broadness of the obligation to consider the best interests of the child in all cases concerning children has not acquired as much attention as it should. To my knowledge, there are no previous systematic studies comparing the application of best interests across different fields of law and few comprehensive studies on the application of the concept in human rights practice.

1.2 Objectives and scope

This doctoral thesis analyses the use of the concept of the best interests of the child in human rights practice at international, regional and national levels, broadening our knowledge of how the best interests concept is understood and used in the jurisprudence of the monitoring bodies of human rights treaties, as well as on the national level. More generally, the analysis is connected to a broader question regarding the interaction and dialogue between systems for the protection of fundamental and human rights. Human rights are protected by various instruments at different levels, and human rights bodies increasingly take account of each other's views, making it necessary to examine the interaction between different systems for the protection of human rights. The thesis focuses on human rights practice because of the importance of jurisprudence for the development of human rights law. Individual cases are not only about specific

43 Eg Jacqueline Bhabha, 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?' (2009) 31 Human Rights Quarterly 410; Tara M. Collins, 'The general measures of implementation: opportunities for progress with children's rights' (2019) 23 The International Journal of Human Rights 338. By implementation, I refer to the integration of a treaty in domestic systems. For criticism of the 'implementation gap' approach, see section 6.7.

44 Stalford, 'The broader relevance of features of children's rights law: the "best interests of the child" principle' 37.

cases; they can clarify and concretise human rights standards and reveal problems that go undetected without observing the provisions in their context.

This thesis is a collection of articles: it consists of four independent, peer-reviewed articles and the current summary. In the summary, I discuss the background of the research questions, present the thesis's central premises, methodological approach and major findings, and reflect on how the articles interact with each other as well as on the broader implications of the findings.

In addition to presenting the articles and discussing their background and implications, the aim of this summary is to reflect on my research process. My thinking became more critical over the course of this research, which is reflected in several aspects of the study. During the early stages of writing this thesis, my fascination with the best interests concept arose from a desire to understand how the concept should be interpreted. I thought that with time and effort, I would arrive at this understanding, which would be the objective of my research. From the outset, I planned to research case law in a systematic way, but I also wanted to discover 'the real meaning' of the best interests concept. Quite soon, however, this objective started to seem unachievable. The more I read, the more clearly I realised that even within human rights law, researchers disagreed on the origins, scope, interpretation and justification of human rights. The need to take into account each child's individual circumstances also makes it impossible to define the concept on an abstract level. As I became more critical of the best interests concept, searching for a perfect definition lost its allure, although I still consider it valuable to contribute to a definition that is tenable in the light of the current human rights framework.

Even though this thesis does not aspire to a seamless definition of best interests, the indeterminacy criticisms of best interests discussed in section 1.1 inspired this thesis in several ways. Not because indeterminacy would be exceptional: as many legal provisions are indeterminate and open to multiple interpretations,[45] it is not useful to overemphasise the indeterminate nature of human rights provisions. Indeterminacy can be considered an inevitable aspect of law in general as predicting the future is impossible.[46] Indeed, some consider indeterminacy as a strength of the best interests concept as it permits flexibility

45 According to Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. If this leaves the meaning ambiguous or obscure, travaux préparatoires can be used to determine the meaning (Article 32).

46 For a discussion of indeterminacy, see eg Jules L Coleman and Brian Leiter, 'Determinacy, Objectivity, and Authority' (1993) 142 University of Pennsylvania Law Review 549; Mark Tushnet, 'Defending the Indeterminacy Thesis' (1996) 16 Quinnipiac Law Review 339.

in the application of the concept.[47] Nevertheless, indeterminacy increases the need to study jurisprudence.

Guided by the above considerations, I decided to examine the understanding of the best interests concept by a specific body in each of the thesis's four articles to discover how the analysed actors understand and use the concept in their case law. The findings of the articles are then critically examined in light of the normative framework of human rights law. The thesis as a whole addresses the following overarching research questions:

1. How should the concept of the best interests of the child be understood in the light of human rights law?
2. How do courts of law and human rights monitoring bodies understand and use the concept of the best interests of the child in their jurisprudence? How does the concept interact with other interests and rights in concrete cases?
3. How do the domestic, European and international levels interact with each other?

The individual articles explore the following research questions, respectively, moving from the national to the European and, finally, the global context:

I. How do national courts – more specifically, the Supreme Administrative Court of Finland (SAC) – understand and use the best interests concept in their jurisprudence? Has the SAC considered best interests in its judgments concerning children in the way required by Article 3(1) CRC? What kind of differences, if any, exist between case groups?
II. How does the ECtHR understand and use the best interests concept in its child protection and immigration case law? What kind of differences, if any, exist between the two case groups?
III. Does the CRC Committee's threefold understanding of Article 3(1) CRC as a substantive right, interpretive principle and procedural rule adequately describe the nature of the best interests concept? In what ways has the ECtHR relied on the concept as a procedural obligation?
IV. How does the CRC Committee understand the best interests concept in its concluding observations (COs)?

Article I analyses the application of the concept in the national, Finnish context and discusses whether, and how, the best interests of the child have been considered in the case law of the SAC. It argues that the SAC's selective

47 Bracken, *Same-Sex Parenting and the Best Interests Principle* 27-28.

reliance on the best interests concept is problematic. Articles II and III consider the best interests concept in the European Convention on Human Rights (ECHR) system because of the importance of the ECtHR's views; the Court's example in conceptualising and weighing the best interests of the child significantly affects national interpretations. Article II compares the child protection and immigration judgments of the ECtHR and analyses the role of best interests in the ECtHR's argumentation. The article shows that significant differences exist regarding who benefits from the application of the concept and who does not: references to best interests can lead to either outcomes that are in line with the CRC, as they often do in child protection cases, or problematic argumentation, as they often do in immigration cases. Article III argues that the best interests concept should be understood as a predominantly procedural obligation that obliges decision-makers to consider the best interests of the child in all actions concerning children. The article uses the ECtHR's three-layered procedural approach to illustrate the kind of requirements of decision-making that a procedural understanding might elicit. Article IV analyses how the CRC Committee conceptualises the best interests concept in its COs, contending that the Committee focuses on structures that advance the implementation of the best interests of the child instead of attempting to define the concept. Examining the best interests concept on three different levels of human rights practice allows for a comparison between different systems. An important strand throughout all four articles is the interaction in concrete cases between the best interests concept and other interests or rights, including the rights of others, the rights of children and the interests of the state.

The contribution of the thesis lies in producing new, systematically collected information about how the best interests concept is understood in concrete cases. The thesis provides novel perspectives on the uneven application of the best interests concept in human rights practice at the domestic, European and international levels and situates the problems related to the concept's application in a broader context of state obligations and human rights argumentation. Although the geographically restricted selection of court cases must be kept in mind when interpreting the findings, the analysis of how the actors have used and interpreted the best interests concept is valuable more generally and can help to improve future decision-making. The thesis further contributes to human rights research on a broader scale by analysing the move from the substantive to the procedural and structural protection of human rights in human rights practice. The thesis also has methodological implications for legal human rights research in general as it suggests that systematic case studies and the comparison of different fields of law are valuable methods for studying relevant issues, especially the legal treatment of vulnerable groups.

There are several possible paths any thesis can take, which is especially true for collections of articles, as the structure allows different aspects of the object

studied to be emphasised. Opening certain doors inevitably closes others, leaving some questions outside the scope of the research. Limitations of the study are discussed in more detail in section 6.7. In the following, I reflect on the limitations related to the scope of the study.

Naturally, the articles do not paint a full picture of the best interests concept and how it functions in all possible contexts. While the SAC, the ECtHR and the CRC Committee constitute a selection of human rights bodies relevant to this study's focus, it is clear that I could have made different choices. Other conventions important for the determination of children's best interests include the UN Convention on the Rights of Persons with Disabilities (CRPD) and the International Covenant on Civil and Political Rights (ICCPR) through the case law of the Human Rights Committee (CCPR). This thesis concentrates on the European human rights system, but other regional systems are also involved in protecting the best interests of the child.[48] On the European level, another path could have been to analyse EU law and the Court of Justice of the EU (CJEU) in particular. The best interests provision has an established position in EU law already because the Charter of Fundamental Rights of the European Union (CFREU) directly guarantees the best interests of the child in Article 24.[49] The CJEU has relied on the best interests concept in its case law and issued several influential judgments, some arguably advancing the implementation of best interests more than most ECtHR judgments.[50] However, the best interests concept has already been studied in, for example, EU family reunification law,[51] which would have been the most logical choice for me to enable a comparison between ECtHR and CJEU case law. To increase knowledge about the best interests of the child in EU law in a substantial way, I would have needed to analyse a comprehensive set of CJEU case law, which was not possible in this study.

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48 The Inter-American Court of Human Rights (IACtHR) takes a more applicant-focused approach than the ECtHR, as Dembour has demonstrated in migration cases, which has implications for children, too. See Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015).

49 According to Article 24(2) (The rights of the child), 'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'. The wording strongly resembles that of Article 3(1) CRC. Article 24(1) guarantees the right to protection and care necessary for the child's well-being as well as participation rights similar to Article 12 CRC, and Article 24(3) guarantees the right to maintain a relationship and direct contact with both parents unless contrary to the child's interests.

50 See eg Case C-550/16 *A and S v Staatssecretaris van Veiligheid en Justitie* [2018] Judgment of 12 April 2018, where the CJEU held that the date of entry of an unaccompanied minor (and not the date of submitting an application for family reunification) is decisive in determining whether the person is considered an unaccompanied minor within the meaning of the EU family reunification directive. The CJEU came to this conclusion based on the aim of the directive – to promote family reunification and granting a specific protection to refugees, unaccompanied minors in particular – as well as on the principles of equal treatment and legal certainty.

51 Klaassen and Rodrigues, 'The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter'.

This study focuses on court cases and the views of human rights treaty bodies. Judgments by the higher judiciary, let alone the cases of international courts, only represent the tip of the iceberg of cases concerning children.[52] It is not always clear why one case is considered admissible while a similar case is dismissed.[53] As Williams notes, an effective enforcement of rights is more than being able to take a case to court.[54] The effectiveness of case law can be measured in various ways, for example, by exploring the impact of a judgment on the parties of the case and on the law and policies of the respondent state.[55] My objective is not to claim that the materials studied in this thesis represent a complete understanding of best interests. For instance, other than paying attention to whether children have been heard in judicial proceedings, this study did not analyse children's experiences, which are an essential component of determining their best interests.

When interpreting the results of this study, it is important to remember its focus on the views of courts and monitoring bodies and not on the arguments of parties. Consequently, the approach does not allow for an assessment of how arguments are created. In Articles I, II and III, I read the earlier phases and the arguments of parties, too, which comprised the decisions by authorities and lower courts in Article I and national authorities and courts in Articles II and III, but I did not systematically analyse them. Occasionally, I acknowledged them in my analysis, for instance, when observing in Article II that the applicant's claims that the children concerned should have been heard were not taken into account.[56] While including the arguments of parties and the state reports would have added depth to the study, excluding them was a deliberate choice made to limit the amount of materials. It is also beneficial to keep in mind the diversity within the bodies studied. As the articles cover long temporal periods, the members of the CRC Committee, the ECtHR and the SAC have changed. Studying judges' voting patterns falls again outside the scope of this study but could provide useful information on inner dynamics. However, such an approach was not possible given the resources of this thesis, considering the large amount of materials already analysed.

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52 Concerning the ECHR system, see eg Elisabeth Lambert Abdelgawad (ed), *Preventing and sanctioning hindrances to the right of individual petition before the European Court of Human Rights* (Intersentia 2011), which presents concrete factors hindering potential applicants from taking their cases to the ECtHR.

53 See eg Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* 459-466.

54 Jane Williams, 'The Role of Professions in Effective Implementation of the CRC' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill 2017) 144.

55 See eg Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge University Press 2019) 7-8, who has analysed the effectiveness of the ECtHR and CJEU in cases concerning vulnerable migrants, including 'case-specific effectiveness'.

56 Article II, 265.

Although this study did not analyse the arguments of parties or strategic litigation, they obviously influence the argumentation of courts and monitoring bodies. As I briefly discussed in Article II, traces of the language used in the national proceedings are often visible in the Court's argumentation.[57] Concentrating on how arguments are created at the ECtHR and analysing, for example, which actors contribute to determining the best interests of the child and are entitled to represent those interests is a task for future research.[58] Margaria has convincingly argued that studying applicants' personal experiences by conducting interviews reveals otherwise neglected aspects of litigation before the ECtHR. Such an approach may demonstrate, for instance, that a verdict of violation does not necessarily have a positive impact on the applicant's life. A limitation of such an approach, however, is that it does not allow to draw generalisable statements.[59] In my view, both 'in-depth reconstructions of litigation'[60] and comparative or quantitative accounts are valuable, but not everything can be undertaken in a single study.

1.3 Central concepts

In this section, I briefly discuss the central concepts of the thesis. Firstly, for brevity and due to the international human rights law focus of the thesis, I use the term 'human rights' rather than 'fundamental rights' or 'constitutional rights', even though these expressions are commonly used to refer to rights guaranteed by domestic constitutions. Human rights and fundamental rights are similar in many ways, and their difference lies mostly in whether the rights are safeguarded in an international convention or a national constitution (or the CFREU).[61] Human rights originate from domestic constitutional documents, which further accentuates the

57 Article II, 250-251.

58 For children's representation and standing before the ECtHR, see Fenton-Glynn, 'Children, parents and the European Court of Human Rights' 649-652.

59 Alice Margaria, 'Going beyond judgments: exploring the jurisprudence of the European Court of Human Rights' in Rossana Deplano (ed), *Pluralising International Legal Scholarship The Promise and Perils of Non-Doctrinal Research Methods* (Edward Elgar Publishing 2019); see also Simona Florescu, 'Justice from the Perspective of an Applicant: meeting Ms Neulinger' (Strasbourg Observers, 12 November 2018) <https://strasbourgobservers.com/2018/11/12/justice-from-the-perspective-of-an-applicant-meeting-ms-neulinger/> accessed 21 January 2021; Marie-Bénédicte Dembour, 'What It Takes to Have a Case: The Backstage Story of *Muskhadzhiyeva v Belgium* (Illegality of Children's Immigration Detention)' in Elisabeth Lambert Abdelgawad (ed), *Preventing and Sanctioning Hindrances to the Right of Individual Petition before the European Court of Human Rights* (Intersentia 2011).

60 Margaria, 'Going beyond judgments: exploring the jurisprudence of the European Court of Human Rights' 102.

61 For a similar usage, see eg Tuomas Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study* (Hart Publishing 2018) 134-135.

similarities between fundamental and human rights.[62] By 'human rights', I refer to legal human rights, that is, rights that are included in international and regional human rights instruments.[63]

An important concept for the thesis is human rights practice. All the different actors analysed in this thesis participate in the creation of the 'human rights practice' or the 'practice of human rights'.[64] Buchanan defines this practice in a broad way. He notes that the practice is variegated and lists an array of processes and activities covered by it, including (to cite examples relevant to this thesis) 'the activities of international organizations that monitor compliance with the treaties (Treaty Bodies)', 'the actions of international and regional courts when they make reference to human rights in their decisions', as well as 'the recourse to international human rights law by judges in domestic courts'. Furthermore, Buchanan points to the central role of the international legal human rights system – meaning UN-based human rights law and the institutions supporting it – in the practice of human rights.[65] Despite using the term 'human rights practice', however, it is important not to assume that more human rights jurisprudence necessarily equates to increased respect for human rights on the ground.[66] While the decisions of human rights treaty bodies that find a violation may lead to positive results for the victims and contribute to positive future developments more generally, the link is not automatic. Human rights practice, as used in this thesis, does not describe the grassroots level. The concrete process of the contextualisation of human rights, an essential step in transforming universal rights to the concrete level,[67] falls outside the scope of this thesis, even though Articles I and IV address the national level in addition to the international level.

The use of the term 'concept' when referring to the best interests of the child is another terminological choice. In previous research, the terminology varies, with several researchers referring to best interests as a 'principle'.[68] The CRC

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62 Olivier De Schutter, *International Human Rights Law* (3rd edn, Cambridge University Press 2019) 13, 36.

63 I discuss my understanding of human rights in more detail in section 3.2.

64 Allen Buchanan, *The Heart of Human Rights* (Oxford University Press 2013) 5; De Schutter calls it 'international human rights jurisprudence', see De Schutter, *International Human Rights Law* 36. See also Todd Landman, *Studying Human Rights* (Routledge 2006) 5, although Landman does not focus on courts but rather on 'human rights practices' on the ground. Engle Merry, too, uses 'practice of human rights' to refer to local actors, which is different from my use here, see Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108 American Anthropologist 38.

65 Buchanan, *The Heart of Human Rights* 5-6.

66 Fons Coomans, Fred Grünfeld and Menno T Kamminga, 'Methods of Human Rights Research: A Primer' (2010) 32 Human Rights Quarterly 179, 182.

67 On the contextualisation of human rights, see eg Ann Quennerstedt, 'The Political Construction of Children's Rights in Education – A Comparative Analysis of Sweden and New Zealand' (2011) 2 Education Inquiry 453.

68 Eg Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function'; Freeman, 'Article 3: The Best Interests of the Child'.

Committee often does the same, which sometimes seems to be a conscious decision to understand best interests as a principle[69] and sometimes a pattern that does not necessarily reflect a deeper ideology.[70] In Article I, which was written in the early stages of this thesis, I referred to best interests as a principle. I later decided against using the term because, in my opinion, 'concept' is more neutral and does not express any particular understanding of the nature of the best interests of the child. I also do not use the term 'best interests norm' because 'norm' refers to the outcome of interpreting a provision.[71] In addition to referring to best interests as a concept, 'provision' is, therefore, used in this thesis when referring to Article 3(1) CRC. 'Principle', however, is a loaded term. According to Dworkin's division of standards into rules and principles, a rule is either valid or not, whereas a principle 'states a reason that argues in one direction, but does not necessitate a particular decision'. When applied, principles have weight in relation to one another, whereas rules do not. Dworkin identifies policies as a third category of standards and distinguishes them from principles as advancing a certain goal, whereas principles serve as requirements of 'justice or fairness or some other dimension of morality'.[72] Alexy, however, submits that constitutional rights are principles and, as such, 'optimization requirements, characterized by the fact that they can be satisfied to varying degrees'. In contrast, rules are either fulfilled or not.[73] In Alexy's model, Article 3(1) would inevitably be a principle. However, even if Article 3(1) seems at face value like a prototype of principle, it has been argued that in the Dworkinian division, Article 3(1) is a rule because it prescribes a step in the decision-making process.[74] As the findings of this study point in the same direction, I prefer to use terminology that is more neutral.

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69 See, in particular, Article III.

70 When conducting the research for Article IV, for each concluding observation, I documented whether the CRC Committee referred to best interests as a principle, as I initially thought that the terminology might offer insight into how the Committee views the concept. Later, however, I abandoned this line of thought and did not address the question in Article IV because I found the use of the term 'principle' to be rather incidental.

71 I thank Visa Kurki for this observation.

72 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 22-28.

73 Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010) 47-48.

74 Bruce Abramson, 'A Commentary on the United Nations Convention on the Rights of the Child' in André Alen and others (eds), *Article 2: The Right of Non-Discrimination* (Martinus Nijhoff Publishers 2008) 53-54, 66.

1.4 Structure of the summary

I began this summary by introducing the background of the study, the research problem, the objectives and research questions of the study and the central concepts. In section 2, I present the concept of the best interests of the child in human rights law to provide context for the research. International human rights law 'bears the imprint of the time and place at which it comes into being',[75] which is why it is important to look at its drafting. In addition, section 2 explores the general comments of the CRC Committee and claims that balancing of best interests is a central problem that the general comments do not sufficiently clarify. Section 3 addresses the central underlying assumptions of the thesis that have shaped my approach. Section 4 presents the methodological approach as well as the materials of the articles. The methodological implications of the thesis for legal human rights research in general are also discussed in section 4. Section 5 presents the articles and their major findings; when relevant, I also update on some important developments taken place after the publication of the articles. In section 6, I discuss the findings of the articles through theoretical lenses that helped me understand what was significant in the findings. These theoretical lenses allow shedding light on different aspects of the findings. I also discuss the limitations of the study. Finally, in section 7, I summarise key points and identify future research needs.

75 Wouter Vandenhole, 'Decolonising children's rights: of vernacularisation and interdisciplinarity' in Rebecca Budde and Ursula Markowska-Manista (eds), *Childhood and Children's Rights between Research and Activism: Honouring the Work of Manfred Liebel* (Springer 2020) 187.

2 RESEARCH CONTEXT: BEST INTERESTS OF THE CHILD IN THE CRC

2.1 How best interests entered human rights law

This section introduces the context of the study, that is, the concept of the best interests of the child in human rights law. The background is crucial because it highlights the development of the concept, the interpretation of the CRC Committee and some problems associated with that interpretation. The section discusses the drafting history of the best interests concept in the CRC, the concept's inclusion in the CRC's 'general principles', the CRC Committee's General Comment on best interests (GC14) and other general comments, and, finally, the questions that the Committee's approach leaves unanswered. The section focuses on the CRC as the concept became a human rights law concept upon inclusion in the CRC. According to my understanding, the CRC changed the best interests concept in three important ways: it broadened the scope of the concept, made best interests a primary consideration, and established a connection between best interests and human rights.[76]

Even though the role of *travaux préparatoires* is not as central in interpreting international treaties as in interpreting national legislation,[77] understanding where the concept came from is essential. The drafting records of the CRC help to reveal how the drafters conceived of the best interests concept, its place in the CRC in relation to other provisions and what kind of connotations were attached to it. It is also interesting to observe whether the elevated status of Article 3(1) in the interpretation of the CRC can be traced to the drafting phase.

The notion of best interests was not created by those who drafted the CRC. 'Best interests' have existed in many national jurisdictions for a long time, although they were narrow in scope and usually arose in matters related to family law. The Universal Declaration of Human Rights does not grant children any special rights, but it provides in Article 25(2) that 'Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection'. The CRC was preceded by two declarations, the 1924 and the 1959 Declarations of the Rights of the Child. Drinan articulates the prevailing view that the international human rights community did not speak about children's rights until the drafting of the CRC,

76 In Article I, I claimed that there were two major changes. However, I currently think that the primacy of best interests deserves to be mentioned as one of the three.

77 According to Article 32 VCLT, travaux préparatoires are included in 'supplementary means of interpretation'.

claiming that the law regulating families was 'the most local of all laws', which is why internationalising it was a big step.[78] According to common understanding, the agenda of the children's rights movement underwent a transformation from protecting children to protecting their rights,[79] and both agendas are visible in the CRC.[80] The drafting of the CRC was initiated by Poland, who proposed to the UN Commission on Human Rights in 1978 that a convention on the rights of the child be adopted. Several states expressed their support for drafting such a convention to celebrate the International Year of the Child of 1979.[81] Alston sees the Polish proposal as motivated by politics of Cold War and communist countries' emphasis on economic and social rights.[82]

Unlike some other central articles of the CRC, Article 3 was present from the beginning of the drafting process.[83] The formulation in the first Polish proposal was identical to the respective 'principle 2' of the 1959 Declaration on the Rights of the Child,[84] and it had been Poland who suggested including this principle in the Declaration.[85] The similarity with principle 2 was assumedly due to a tight

78 Robert F Drinan, *The Mobilization of Shame: A World View of Human Rights* (Yale University Press 2001) 45-46.

79 See eg Michael Freeman, 'The Sociology of Childhood and Children's Rights' (1998) International Journal of Children's Rights 433, 434-435.

80 Didier Reynaert, Maria Bouverne-De Bie and Stijn Vandevelde, 'Between "believers" and "opponents": Critical discussions on children's rights' (2012) 20 The International Journal of Children's Rights 155, 158.

81 Commission on Human Rights, 'Report on the thirty-fourth session (6 February – 10 March 1978)' E/CN.4/1292, paras 305-311. For analyses of the drafting history of the CRC in previous research, see eg Anna Holzscheiter, *Children's rights in international politics: The transformative power of discourse* (Springer 2010); Zoe Moody, *Les droits de l'enfant. Genèse, institutionnalisation et diffusion (1924-1989)* (Editions Alphil 2016); Cynthia Price Cohen, 'The Developing Jurisprudence of the Rights of the Child' (1993) 6 St Thomas Law Review 1, 2-25; Cynthia Price Cohen, Stuart N. Hart and Susan M. Kosloske, 'Monitoring the United Nations Convention on the Rights of the Child: The Challenge of Information Management' (1996) Human Rights Quarterly 439; Sylvie Langlaude, 'Children and Religion under Article 14 UNCRC: A Critical Analysis' (2008) 16 The International Journal of Children's Rights 475.

82 Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' 6.

83 Elaine E. Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities' in Elaine E. Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge University Press 2016).

84 According to principle 2, 'The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration'. Best interests are also mentioned in principle 7 concerning its guiding function for parents. See also Nigel Cantwell, 'The Origins, Development and Significance of the United Nations Convention on the Rights of the Child' in Sharon Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff Publishers 1992) 19; Jaap Doek, 'The Current Status of the United Nations Convention on the Rights of the Child' in Sharon Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff Publishers 1992) 632.

85 Commission on Human Rights, 'Report of the Fifteenth Session (16 March – 16 April 1959)' E/CN.4/789, paras 136-140.

schedule and the expectation of little debate over a proposal based on principles already agreed upon.[86]

Article 3(1) CRC in its final form, however, differs from the best interests principle in the 1959 Declaration. Alston claims that a central difference is that in the 1959 Declaration, the principle appears 'in a context in which the child is more the object than the subject of rights'. The scope of Article 3(1) is also broader as it does not apply solely in the context of legal and administrative proceedings.[87] The crucial difference between the CRC and the declarations is that the CRC is binding and has an implementation mechanism, which the declarations lacked. Cohen has argued that, unlike nearly every other treaty based on a previous declaration, the CRC 'totally revised the previously accepted notion of children's rights, bearing only a slight resemblance to the Declaration of the Rights of the Child that inspired it'.[88] Cantwell considers the CRC Committee's statement that the concept 'was already enshrined' in the 1959 Declaration as well as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[89] misleading because the formulations were much narrower in the declaration.[90] While it is true that the formulation of the best interests concept in the CRC is more extensive than in the declaration, the CRC also contains the tension between children's agency and care needs found in the 1959 Declaration[91] and portrays the child as '*both* dependent and independent'.[92] Tobin argues that the need to protect children, which derives from their special vulnerability – a central part of the moral justification of the CRC –, consists of two ideas: protecting children, firstly, against potential harm from others and, secondly, against potential harm from themselves.[93]

During the drafting process that started in 1979,[94] the Polish proposal underwent a number of changes as several states were concerned that, for example,

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86 Cantwell, 'The Origins, Development and Significance of the United Nations Convention on the Rights of the Child' 21.

87 Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' 4.

88 Cohen, 'The Developing Jurisprudence of the Rights of the Child' 3-5.

89 GC14, para 2.

90 Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' 62-63.

91 Wouter Vandenhole, Gamze Erdem Türkelli and Sara Lembrechts, *Children's Rights: A Commentary on the Convention on the Rights of the Child and Its Protocols* (Edward Elgar Publishing 2019) 31.

92 Solveig Hägglund and Nina Thelander, 'Children's rights at 21: policy, theory, practice – Introductory remarks' (2011) 2 Education Inquiry 365, 365.

93 John Tobin, 'Justifying Children's Rights' (2013) 21 The International Journal of Children's Rights 395, 426-429.

94 An 'Open-ended Working Group on the Question of a Convention on the Rights of the Child' was set up by the Commission on Human Rights and started to draft the CRC in 1979. The working group was 'open-ended' because any of the 43 states represented on the Commission were allowed to participate, see Cantwell, 'The Origins, Development and Significance of the United Nations Convention on the Rights of the Child' 21-22.

the language lacked the preciseness and clarity required in legally binding texts.[95] However, the implementation of the rights guaranteed was not discussed. The problems of consensus-based law-making also characterised the drafting of the CRC. The records only communicate the views of those who spoke, and a view expressed by one state was not necessarily endorsed by others.[96] The CRC was unanimously adopted by the General Assembly on 20 November 1989, and it entered into force on 2 September 1990.[97] The convention is the first human rights treaty to go against tradition by safeguarding both civil-political and economic, social and cultural rights (ESC rights) in a single text.[98]

Tracking references to 'best interests' in the CRC's drafting records reveals two important points concerning the best interests concept. Firstly, the meaning of best interests was little discussed during the drafting.[99] Compared to several other articles of the CRC, the discussions related to Article 3(1) were relatively brief. The scope of the provision was discussed: the list of bodies that are obliged by the provision to take best interests into account was amended several times, and the delegates noted the difference between public and private bodies.[100] This seems reasonable, although the structure of human rights conventions as creating state obligations already places strong emphasis on public decision-making. One can, therefore, assume that the broad scope, which is one of the most significant characteristics of the provision, was intentional. Secondly, the drafting process concentrated on the hierarchical status of best interests. Different wordings were considered regarding the primacy of Article 3(1) – should best interests be the paramount, the primary or a primary consideration, or should they be of primary consideration? From the perspective of human rights law, best interests as 'a primary' instead of 'the paramount' consideration seems justified. It is quite clear that other interests and rights can – at least sometimes – be preferred over

95 Commission on Human Rights, 'Question of a Convention on the Rights of the Child. Report of the Secretary-General' E/CN.4/1324 (27 December 1978); see eg submissions by Denmark, the Netherlands and the United Kingdom.

96 On the idea of consensus in the drafting, see Ann Quennerstedt, Carol Robinson and John I'Anson, 'The UNCRC: The Voice of Global Consensus on Children's Rights?' (2018) 36 Nordic Journal of Human Rights 38-54.

97 Sharon Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff Publishers 1992) 1.

98 See eg Eugeen Verhellen, 'The Convention on the Rights of the Child: Reflections from a historical, social policy and educational perspective' in Wouter Vandenhole and others (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015) 49.

99 Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' 10-11.

100 Commission on Human Rights, 'Report of the Working Group on a Draft Convention on the Rights of the Child' E/CN.4/L.1575 (17 February 1981), paras 22-24; Commission on Human Rights, 'Report of the Working Group on a Draft Convention on the Rights of the Child' E/CN.4/1989/48 (2 March 1989), paras 117-126.

children's rights, and consequently the use of a vocabulary that implies that children's rights and interests always prevail would be misleading.[101]

It is noteworthy that the meaning of interests, or best interests, was not discussed in the drafting. As Alston has observed, it seems that the delegates assumed for some reason that the term itself did not need clarification, or they considered the meaning unimportant.[102] Some submissions, however, indicated that the concept is vague and of a general nature and, therefore, open to multiple interpretations.[103] The interaction between best interests and children's rights was not explicitly addressed in the drafting either. Even though the notion of best interests was present from the beginning of the drafting, it was not reviewed after including a comprehensive set of rights in the convention.[104] What is perhaps even more significant, however, is that none of the delegates appears to have questioned the implications of according best interests such a prominent role in the convention (although France suggested that best interests be included in the preamble rather than in the body of the convention).[105] With the benefit of hindsight, these questions should have received more attention than the records suggest they did.

However, the lack of attention given to the definition of best interests in the context of Article 3(1) is not the full picture: discussions regarding other, more context-specific and, therefore, concrete provisions can provide insight. The drafting records of these provisions reflect some kind of a general agreement over the case-by-case nature of the concept. However, one can naturally question the extent to which the understanding of best interests as a concept with a case-by-case nature can be attributed to the structure of any legal norm applicable to different situations. Furthermore, the concept often appears to justify an exception from a practice that is in most situations in accordance with children's rights; but this is not always the case, which is why a possibility to deviate is needed. Several

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101 The use of the modal auxiliary 'shall' in the provision may create confusion as to how binding the obligation to consider best interests is as 'shall' has been considered imprecise in general, see eg Christopher Williams, *Tradition and Change in Legal English: Verbal Constructions in Prescriptive Texts*, vol 20 (Linguistic insights, 2nd edn, Peter Lang 2007); however, 'shall' is commonly used in treaties, eg the ECHR, to express obligation, see Germana d'Acquisto and Stefania d'Avanza, 'The Role of SHALL and SHOULD in Two International Treaties' (2009) 3 Critical Approaches to Discourse Analysis across Disciplines 36. It, thus, seems clear that 'shall' creates a binding obligation.

102 Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' 10-11.

103 Similarly, see Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities' 29. See eg the submission of three nongovernmental organisations indicating that the general nature of the provision may induce states to interpret the concept so that it allows discriminatory practices, Commission on Human Rights, 'Question of a Convention on the Rights of the Child: Proposals Submitted by the Following Non-governmental Organizations in Consultative Status: International Federation of Human Rights, International Federation of Women in Legal Careers, Pax Romana (Category II)' E/CN.4/1984/WG.1/WP.6 (30 January 1984).

104 Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' 65.

105 Ibid 63.

examples of this can be found in the discussions, such as in the context of the deprivation of children's liberty and whether children deprived of their liberty should always be separated from adults or whether there is room for exceptions.[106]

It is interesting to compare the drafting process of Article 3(1) with those of other themes. Sabatello has shown that questions related to bioethics constantly surfaced in the drafting of the CRC and argues that the absence of provisions regulating children's bioethics in the CRC 'indicates the controversial nature of the subject rather than a lack of care or attention'.[107] Another debated issue was the status of the unborn child, which was eventually left open in the convention.[108] While the intuitive idea could be that important issues are discussed and less important ones are not, in the case of the CRC, the element that distinguishes the issues discussed does not seem to be importance but controversiality. The more controversial an issue, the more it was discussed during the drafting – and the more likely it never found a place in the CRC. In contrast, the more the drafters assumedly agreed on an issue, the less need there was to discuss it, as in the case of best interests.

2.2 Inclusion in 'general principles'

Article 3 acquired a special status in the CRC at the very latest in 1991 when the CRC Committee declared it to be a general principle together with Articles 2 (non-discrimination), 6 (right to life, survival and development) and 12 (participation). The concept of general principles was invented by the members of the Committee in the context of drafting the guidelines for state reports in 1991. Initially, the term 'general principles' was not used; in the first draft, Articles 2, 3 and 12 were placed under the heading 'the child and the law',[109] after which the heading was changed to 'basic principles'[110] and, eventually, to 'general principles'[111].

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106 Commission on Human Rights, 'Report of the Working Group on a Draft Convention on the Rights of the Child' E/CN.4/1986/39 (13 March 1986), paras 91-123.

107 Maya Sabatello, *Children's Bioethics: The International Biopolitical Discourse on Harmful Traditional Practices and the Right of the Child to Cultural Identity* (Brill 2009) 25-26.

108 See eg Philip Alston, 'The Unborn Child and Abortion under the Draft Convention on the Rights of the Child Symposium: UN Convention on Children's Rights' (1990) 12 Human Rights Quarterly 156.

109 Committee on the Rights of the Child, 'Matters relating to the Committee's methods of work in respect of the consideration of reports to be submitted by States parties in accordance with article 44 of the Convention' CRC/C/L.2 (30 August 1991), para 7.

110 Committee on the Rights of the Child, 'Summary record of the 11th meeting, held at the Palais des Nations, Geneva, on Monday, 7 October 1991' CRC/C/1991/SR.11 (28 January 1992), para 58.

111 Committee on the Rights of the Child, 'General guidelines regarding the form and content of initial reports to be submitted by States Parties under Article 44, paragraph 1 (a), of the Convention, Adopted by the Committee on its 22nd meeting (first session) on 15 October 1991' CRC/C/5 (30 October 1991), paras 13-14.

The CRC Committee was the first monitoring body to choose general principles.[112] The Committee is entitled to monitor and interpret the CRC, but is naming some provisions 'general principles' more than interpretation? This is an important question because prioritising is not only about highlighting certain provisions but also about downplaying others.[113] The records do not clarify what the Committee meant by principles, nor do they explain the selection of general principles. One reason for treating best interests as one of the 'principles' of the CRC may be that as they were one of the 'principles' of the 1959 Declaration, naming them a 'principle' of the CRC seemed a natural development.

Abramson has tried to discover why the Committee chose general principles by interviewing members of the Committee. Members who joined the Committee after the original members had departed referred to tradition. Abramson's discussions with the original members indicate that 'general principles' were chosen for strategic reasons to increase knowledge about the CRC, which seems logical to some extent. As Abramson argues, however, what seemed like a strategic choice in the early days of the CRC has now contributed to blurring the line between a rule and a principle. This is partly because the Committee did not conduct a careful analysis regarding whether the 'general principle' provisions in fact contained a principle.[114] As Hanson and Lundy argue, the general principles 'are not necessarily "general" or even "principles"'.[115]

Despite this lack of clarity, the idea of best interests as a general principle has become a cornerstone of the Committee's interpretation of the CRC. Regarding all the CRC general principles, the Committee has expressed that they are overarching principles that should be read together with all the other CRC rights. The principles should 'constitute the framework for the design and implementation of policy in all actions concerning children'.[116] Along the same lines, Hanson and Lundy have proposed an alternative conceptualisation of the general principles in which Articles 2, 3, 5 (instead of 6) and 12 would be called 'cross-cutting standards' to illustrate their relevance for substantive CRC articles. Hanson and Lundy submit that these four articles have been formulated in the CRC in a way that makes

112 The CRPD also names certain articles as general principles, but this is done in the text of the convention – Article 3 lists eight general principles, eg non-discrimination and equality of opportunity.

113 Abramson, 'A Commentary on the United Nations Convention on the Rights of the Child' 65-66.

114 Ibid 64-65.

115 Hanson and Lundy, 'Does Exactly What it Says on the Tin?' 286.

116 Committee on the Rights of the Child, 'Concluding observations: Cuba' CRC/C/15/Add.72 (18 June 1997), para 33. For a review of the Committee's use of 'general principles', see Hanson and Lundy, 'Does Exactly What it Says on the Tin?' 292-298.

them relevant for that purpose.[117] While the word 'principle' may not be the best fit to describe the obligation contained in Article 3(1), the cross-cutting nature of the provision seems logical in light of the need for case-by-case assessments.

2.3 General comments of the CRC Committee: a rights-based understanding and a gap between ideals and practice

In 2013, the CRC Committee guided the interpretation of Article 3(1) with a general comment, GC14. The Committee is free to issue a general comment on any CRC-related matter that it considers significant.[118] The general comment was delivered late given that the Committee had already declared Article 3 as a general principle in 1991. Cantwell sees the delay as reflecting the problems of interpreting the concept,[119] although it is also true that the Committee had already guided states on the interpretation of the concept in previous general comments focusing on other matters and in COs directed to individual states. However, as Cantwell remarks, the lack of global jurisprudence regarding the best interests concept – due to the concept being applied to children only – underlined the need for the Committee to clarify the interpretation.[120]

GC14 comments on the three major aspects – scope, primacy and connection to human rights – in which the CRC and the Committee's interpretations changed the best interests concept, especially the third. Firstly, the CRC broadened the scope of the concept to 'all actions concerning' children. The scope can be inferred from the wording of Article 3(1), and the CRC Committee further specifies in GC14 that the provision also applies to omissions[121] and to cases indirectly concerning children, be it one child, children as a group or children in general.[122] The Committee underlines in GC14 that the list of actors that have to consider best interests is broad.[123] Secondly, the CRC made best interests 'a primary consideration' in matters concerning children. In GC14, the Committee justifies this primacy with children's special status.[124] The primacy is reflected in the wording of Article 3(1),

117 Hanson and Lundy, 'Does Exactly What it Says on the Tin?' 298-302. Varadan, however, does not consider Article 5 as a broader principle of the CRC. See Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 The International Journal of Children's Rights 306, 330-331.

118 Committee on the Rights of the Child, 'Rules of procedure' CRC/C/4/Rev.5 (1 March 2019), rule 73.

119 Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' 64.

120 Ibid.

121 GC14, paras 17-18.

122 GC14, paras 19-24.

123 GC14, paras 25-31.

124 GC14, para 37.

although it is unclear what the primacy means – does it refer to the order of considering various factors, or does it refer to the weight accorded to best interests? Thirdly, the CRC explicitly connected best interests to human rights. Unlike the other two changes, the connection between best interests and human rights is not visible from the wording of Article 3(1), but it can be deduced from the general rules on treaty interpretation described in section 3.2; in light of the object and purpose of the CRC, it is logical that in a convention with the purpose of safeguarding children's human rights, 'best interests' are interpreted in a rights-based way.[125]

Throughout GC14, the Committee underlines the need to interpret best interests in line with other CRC provisions,[126] especially Article 12 and other general principles.[127] The Committee asserts that 'The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognised in the Convention and the holistic development of the child' and that best interests cannot be used to justify outcomes breaching children's rights because all CRC rights are in the best interests of the child.[128] In GC14, the CRC Committee clarifies its understanding of the nature of the right guaranteed by Article 3(1), expressing its understanding of best interests as a 'threefold concept' with its functions being a substantive right, an interpretative principle and a procedural rule.[129] A more in-depth analysis of the functions of the concept is made in Article III[130] and later in this summary; suffice to say here that based on the analysis of Article III, I find the function as a procedural rule the best fit for a context in which children's rights have to be limited. For the CRC Committee, however, the three functions are equally important.[131]

In GC14, the Committee divides the act of defining best interests in a concrete case into 'assessment', which refers to evaluating and balancing the constituents of best interests in a given situation, and 'determination', which refers to a 'formal process' in which best interests are determined based on the assessment.[132] Within the best interests determination, the Committee introduces 'procedural safeguards to guarantee the implementation of the child's best interests', displaying the function as a procedural rule. These safeguards include the following: the right

125 As eg Kilkelly has noted, this interpretation is supported by the CRC: 'Reading Article 3(1) in light of the Convention as a whole undoubtedly bolsters the argument for presenting Article 3(1) as a rights principle, underpinned by the child's status as a rights-holder', see Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' 57.

126 See eg GC14, para 32.

127 GC14, paras 41-45.

128 GC14, para 4.

129 GC14, para 6(a)-(c).

130 Article III, 751-755.

131 GC14, para 7.

132 GC14, paras 46-51.

to express his or her views; basing the assessment on established facts; prioritising decisions concerning children in terms of time; having qualified professionals conduct the assessment and relying on the knowledge of relevant area(s) to assess the alternative solutions; providing the child with a legal representative; paying attention to the quality of reasoning, especially if the solution is not in the best interests of the child; having mechanisms available to review decisions; and undertaking child rights impact assessments.[133]

When analysing the Committee's understanding of best interests, it is important to remember earlier general comments, as references to best interests have been present from the very beginning in the general comments. To my knowledge, the other general comments have not been systematically analysed from this perspective, which is why I briefly present them here. In earlier general comments, the Committee often underlines the relationship between best interests and other general principles without further explaining the connection.[134] It is clear, however, that best interests are supposed to be an underlying principle guiding action in several contexts[135] and part of a paradigm shift towards a child rights approach.[136] According to the Committee, 'the interpretation of a child's best interests must be consistent with the whole Convention'.[137] The interdependent relationship of Articles 3 and 12 and the requirement to follow Article 12 when determining the child's best interests are often highlighted in the general comments.[138] The broad scope of the concept is underlined: the concept is applicable to both legislation and to decision-making.[139] Best interests also appear in contexts in which a decision that would limit the rights of the child is being considered, and the Committee expresses that best interests may justify an exception,[140] but not one that breaches

133 GC14, paras 85-99.

134 Committee on the Rights of the Child, 'General Comment no. 1. Article 29 (1): The Aims of Education' CRC/GC/2001/1 (17 April 2001), para 6; Committee on the Rights of the Child, 'General Comment No. 3 (2003). HIV/AIDS and the rights of the child' CRC/GC/2003/3 (17 March 2003), para 5; Committee on the Rights of the Child, 'General Comment No. 6 (2005). Treatment of unaccompanied and separated children outside their country of origin' CRC/GC/2005/6 (1 September 2005), para 1; Committee on the Rights of the Child, 'General Comment No. 11 (2009). Indigenous children and their rights under the Convention' CRC/C/GC/11 (12 February 2009), para 14.

135 Committee on the Rights of the Child, 'General Comment No. 10 (2007), Children's rights in juvenile justice' CRC/C/GC/10 (25 April 2007), para 5.

136 Committee on the Rights of the Child, 'General comment No. 13 (2011). The right of the child to freedom from all forms of violence' CRC/C/GC/13 (18 April 2011), para 59.

137 General Comment no 13, para 61.

138 Committee on the Rights of the Child, 'General Comment No. 12 (2009). The right of the child to be heard' CRC/C/GC/12 (20 July 2009), para 68, 70-74.

139 Committee on the Rights of the Child, 'General Comment No. 9 (2006). The rights of children with disabilities' CRC/C/GC/9 (27 February 2007), paras 29-30.

140 Committee on the Rights of the Child, 'General comment No. 4 (2003). Adolescent health and development in the context of the Convention on the Rights of the Child' CRC/GC/2003/4 (1 July 2003), para 29; General Comment no 6, paras 30 and 40; General Comment no 12, para 61.

the rights of the child, for instance, corporal punishment[141] or that in reality serves the interests of the state.[142] Best interests also appear in contexts where the Committee highlights a child-centred approach,[143] impact assessments,[144] the connection between best interests and budgeting[145] and active measures by the state.[146] Early on, the Committee emphasised the need to consider systematically the impact of actions on children as well as the applicability of best interests to cases indirectly concerning children.[147] In some contexts, such as those concerning unaccompanied migrant children, the Committee has underlined the importance of procedural safeguards, such as appointing a guardian and the possibility to review decisions.[148] The general comments also provide occasional substantive statements on which options are in the best interests of the child and which are not.[149] Family unity is consistently emphasised.[150] Children's dependency appears as the rationale for why authorities need to be particularly aware of children's interests.[151] The interplay between children's independent agency and evolving capacities is also present in the general comments.[152] The views of the Committee in earlier general comments are in line with the views presented in GC14, regarding, for example, the need to assess best interests both for individual children and for children as a group.[153]

Since GC14, the Committee has expanded on the relationship between best interests and specific rights of the child, such as Article 24 CRC on the right

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141 Committee on the Rights of the Child, 'General Comment no. 8 (2006). The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)' CRC/C/GC/8 (2 March 2007), para 26.

142 General Comment no 10, para 85.

143 General Comment no 1, para 9; General Comment no 3, para 10.

144 Committee on the Rights of the Child, 'General Comment No. 2. The role of independent national human rights institutions in the promotion and protection of the rights of the child' CRC/GC/2002/2 (15 November 2002), para 19(i); Committee on the Rights of the Child, 'General comment No. 5 (2003). General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)' CRC/GC/2003/5 (27 November 2003), para 45.

145 General Comment no 5, para 51; General Comment no 13, para 61.

146 Committee on the Rights of the Child, 'General Comment No. 7 (2005). Implementing child rights in early childhood' CRC/C/GC/7/Rev.1 (20 September 2006), para 20.

147 General Comment no 5, para 12.

148 General Comment no 6, paras 19-22.

149 Eg General Comment no 6, para 82, where the Committee states concerning unaccompanied children that 'Family reunification in the country of origin is not in the best interests of the child.'

150 General Comment no 8, para 42; General Comment no 13, para 56.

151 General Comment no 7, paras 13(a) and (b), 36.

152 General Comment no 7, para 17.

153 General Comment no 7, paras 13(a)-(b); Committee on the Rights of the Child, 'General Comment No. 11 (2009). Indigenous children and their rights under the Convention' CRC/C/GC/11 (12 February 2009), paras 30-33.

to health,[154] and underlined more systematically the phases of best interests assessment and determination as well as the obligation to explain in decisions how best interests have been weighed against other considerations.[155] The Committee has also drawn on these criteria to assess and determine best interests in more specific contexts, such as budgeting.[156] The emphasis on the case-by-case assessment of best interests is also visible in latter general comments,[157] as is the relationship between Articles 3 and 12 CRC.[158] The Committee has further noted that an exception from a CRC right because of the best interests of the child should be narrowly interpreted.[159] Themes identified in previous general comments, such as impact assessments[160] and the need to interpret best interests in a rights-based way,[161] have continued to be relevant in the general comments, as has the threefold structure of Article 3(1).[162] The Committee has specified that in addition to the obligation to take active measures, Article 3(1) contains a negative obligation, too.[163] The important position of best interests in the Committee's work persists, as illustrated by General Comment no 22, of which a significant part is dedicated to describing the relationship between international migration and best interests.[164] However, conflicts between best interests and other interests or rights receive little attention.[165] In General Comment no 23, the Committee, together with the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW Committee) takes an exceptionally direct

154 Committee on the Rights of the Child, 'General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' CRC/C/GC/15 (17 April 2013).

155 Committee on the Rights of the Child, 'General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights' CRC/C/GC/16 (17 April 2013), para 17.

156 Committee on the Rights of the Child, 'General comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4)' CRC/C/GC/19 (20 July 2016), paras 45-47.

157 Committee on the Rights of the Child, 'General comment No. 21 (2017) on children in street situations' CRC/C/GC/21 (21 June 2017), para 28.

158 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, 'Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration' CMW/C/GC/3-CRC/C/GC/22 (16 November 2017), para 37.

159 Committee on the Rights of the Child, 'General comment No. 24 (2019) on children's rights in the child justice system' CRC/C/GC/24 (18 September 2019), para 92.

160 General Comment no 16, para 78.

161 General Comment no 21, para 5.

162 General Comment no 22, para 27.

163 Committee on the Rights of the Child, 'General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31)' CRC/C/GC/17 (17 April 2013), para 14(g).

164 General Comment no 22, paras 27-33.

165 Although see General Comment no 22, para 28.

stance on the immigration detention of children by expressing that such detention should never be allowed and is never in the best interests of the child.[166]

2.4 Open questions: the problem of balancing

To conclude, the drafters of the CRC identified some challenges that are still present in the interpretation of Article 3(1) today. The broad scope of the provision was discussed, and the list of bodies that need to take best interests into account was changed several times. The hierarchical status of best interests was also deliberated at length. At the same time, several challenges related to the concept were not addressed. The interaction between best interests and children's rights did not receive much attention, and the drafters did not question whether the concept should even be included in the convention. The drafting records of other, more specific articles, however, show that the need for case-by-case assessments was present in the drafting process. Soon after the CRC entered into force, the CRC Committee elevated Article 3(1) as one of the convention's general principles.

The Committee's general comments, especially GC14, have advanced the interpretation of the best interests concept by strengthening the link between best interests and children's rights and underlining the broadness of the obligation to consider best interests. Couzens, who has criticised other general comments of the Committee for a lack of engagement with the CRC's legal content, mentions GC14 as an example of a good balance between legal content and advocacy and policy approaches.[167] Couzens also notes that GC14 is the only general comment that explicitly articulates the domestic status of a CRC provision, which is direct applicability in the case of Article 3(1).[168]

Despite the guidance of GC14, the general comments leave open important questions.[169] One such question is balancing. Throughout GC14, the Committee

166 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, 'Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' CMW/C/GC/4-CRC/C/GC/23 (16 November 2017), para 10.

167 Meda Couzens, 'CRC Dialogues: Does the Committee on the Rights of the Child "Speak" to the National Courts?' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill 2017) 119.

168 Ibid 116; GC14, para 6(a).

169 Similarly, see Wouter Vandenhole, 'Distinctive characteristics of children's human rights law' in Eva Brems, Ellen Desmet and Wouter Vandenhole (eds), *Children's Rights Law in the Global Human Rights Landscape* (Routledge 2017) 26, who argues after GC14 that the CRC Committee has not defined the best interests of the child; Vandenhole, Türkelli and Lembrechts, *Children's Rights: A Commentary on the Convention on the Rights of the Child and Its Protocols* 59.

emphasises the case-by-case nature of the best interests concept.[170] Of course, as the Committee specifies, because the concept is dynamic and 'encompasses various issues which are continuously evolving', the 'general comment provides a framework for assessing and determining the child's best interests; it does not attempt to prescribe what is best for the child in any given situation at any point in time'.[171] The Committee does offer some advice for assessing best interests; it explains, for example, the need to consider both the individual characteristics of the child and the social and cultural context when assessing best interests.[172] It also lists elements relevant in a best interests assessment and argues that creating a 'non-exhaustive and non-hierarchical list of elements' is beneficial.[173] As relevant elements, the Committee proposes the child's views, identity, preservation of the family environment, maintaining relations with the family, the care, protection and safety of the child, a situation of vulnerability, the right to health and the right to education.[174]

However, GC14's guidelines for balancing best interests with other interests are not developed. The takeaway is that conflicts must be resolved 'on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise' or by balancing the rights involved and attaching a larger weight to what best serves the child.[175] If the elements conflict, they must be weighed to choose the best solution, which has to be in accordance with the CRC rights. If protecting and empowering the child draw in different directions, 'the age and maturity of the child should guide the balancing of the elements'.[176] Nevertheless, as Eekelaar and Tobin argue, the criteria for weighing interests are rather abstract and fail to address several crucial issues that disrupt best interests assessments, such as indeterminacy and the danger that the principle will be used to advance the interests of others.[177]

Relatedly, a central theme that cannot be solved based on the Committee's guidance is limiting best interests. Can best interests be limited, and if yes,

170 GC14, paras 32-34, 82.

171 GC14, para 11.

172 GC14, para 48.

173 GC14, para 50.

174 GC14, paras 52-79.

175 GC14, para 39.

176 GC14, paras 81-83.

177 Eekelaar and Tobin, 'Article 3: The Best Interests of the Child' 84.

based on what criteria?[178] The CRC Committee has expressed that best interests considerations cannot be overridden by '[n]on-rights-based arguments such as those relating to general migration control'; however, an acceptable (although exceptional) rights-based consideration would be the child constituting 'a serious risk to the security of the State or to the society'.[179] Overall, the takeaway of the Committee's general comments is that best interests and other rights and interests have to be balanced on a case-by-case basis. Interestingly, GC14 uses the terminology of 'balancing'[180] rather than of limiting rights. The Committee does not refer, for example, to the general criteria for limiting human rights, which include reviewing factors such as whether the limitation is lawful, legitimacy of the aim, necessity and proportionality.[181] The status of the best interests of the child in relation to other interests is unclear: while GC14 establishes that children's interests cannot always prevail, it is less apparent what it means to treat children's interests as 'primary'.

The approach of GC14 has been criticised in previous literature. Eekelaar asserts that it does not sufficiently elaborate on the distinction between decisions directly and indirectly concerning children and argues that this distinction should have a bearing on the structure of the reasoning employed in cases concerning children.[182] Cantwell argues that GC14 is based on an 'uncritical reading' of

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178 Cf Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' 16 who suggested even before GC14 that one of the roles of the best interests concept is to be 'a mediating principle which can assist in resolving conflicts between different rights where these arise within the overall framework of the Convention'. Freeman agrees, see Michael Freeman, 'Taking Children's Human Rights Seriously' in Jonathan Todres and Shani M. King (eds), *The Oxford Handbook of Children's Rights Law* (Oxford University Press 2020) 58.

179 General Comment no 6, para 86.

180 There are different definitions of balancing, but the central idea is that competing interests are identified and the decision is reached by assigning values to the interests and assessing them against each other. See eg Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale Law Journal 943, 945. According to Alexy, balancing is 'not a matter of all or nothing but a requirement to optimize', which means that balancing concentrates on 'the degree or intensity of non-satisfaction of, or detriment to, one principle versus the importance of satisfying the other', see Alexy, *A Theory of Constitutional Rights* 105-107. In my view, Alexy's model assumes a greater controllability of the balancing exercise than what most court judgments demonstrate in reality.

181 The CRC system does not have its own criteria for limiting rights (except for specific limitation clauses in some articles protecting civil rights, such as Articles 13, 14 and 15), but the general criteria for limiting human rights are arguably applicable to CRC rights. For the ECHR criteria for limiting rights, see eg George Letsas, 'The scope and balancing of rights. Diagnostic or constitutive?' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013). The ICCPR system has its own criteria that resemble those developed by the ECtHR. See Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' E/CN.4/1985/4 (28 September 1984). See also the permissible limitations test under the Finnish Constitution, which consists of seven cumulative criteria and is more detailed than its international equivalents. One of the criteria is harmony with international human rights obligations, see Constitutional Law Committee 25/1994. See Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations' 146-147.

182 John Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23 The International Journal of Children's Rights 3, 4-6.

Article 3(1),[183] a criticism that brings forward some of the crucial problems of the best interests concept. According to Cantwell, the CRC Committee's approach in GC14 suffers from mixing children's rights and interests: 'the list of issues to be taken into account when determining the best interests of an individual child is essentially no more than a review of the rights implications of various options'.[184]

Critics of GC14 have also proposed solutions to these problems. To reduce indeterminacy, Eekelaar proposes a distinction between cases directly concerning or 'about' children and cases indirectly concerning children or 'affecting' children and, based on this distinction, a different decision-making process in the two archetypal situations. In cases 'about' children, decision-makers must focus on what serves the child best, whereas in cases 'affecting' children, the focus is on searching for the best solution overall.[185] While it is true that some cases concern children more than others, I consider the distinction between cases 'about' and 'affecting' children to be of an artificial nature, given that the consequences of a decision concerning the child's parent, for example, can be similar to those concerning the child. Consequently, a different decision-making process in the two groups risks creating situations where children's interests are privileged in some areas but not in others. Other analytical tools are, therefore, needed.

According to Cantwell, however, the best approach is – paradoxically – to return to the original function of the concept: to see it as a standard for decision-making in situations not covered by rights, including:

- choosing between two or more potential solutions that are, a priori, all consistent with the human rights of the child concerned;
- determining outcomes when there is real or apparent conflict between the requirements of two or more rights;
- broaching issues not covered by existing rights;
- envisaging temporary (reversible) measures in an emergency situation, with reassessment programmed and undertaken as soon as is feasible;
- dealing with situations where the interests of other parties might otherwise jeopardise or unduly influence outcomes for the child – as, for example, when courts of law rely on 'best interest' considerations to determine custody and access conditions in situations of parental divorce;
- examining the justification for derogating from specific rights where this is explicitly foreseen in the CRC if deemed to be in the child's best interests: removing a child from parental care and the family

183 Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' 64.

184 Ibid 64-67.

185 Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children'.

> environment (arts. 9(1) and 20(1)), denying contact with parents (art. 9(3)), envisaging deprivation of liberty with adults (art. 37(c)) and excluding the presence of parents during judicial proceedings (art. 40(2)(b)(iii)).[186]

Skelton, exploring Cantwell's criticism and classification of the concept, has divided the situations in which applying the best interests concept is legitimate into three categories: weighing between different interests, justifying a derogation from certain rights when the CRC provides a derogation to be in the child's best interests (eg Article 9), and filling gaps in the existing human rights framework.[187]

While I agree that the principle is applicable in the situations Cantwell mentions, I also believe that weighing between interests is precisely where the problem lies. The Committee's guidelines in GC14 or other general comments do not sufficiently clarify how best interests should be balanced against other rights or interests. This makes it all the more important to analyse how the concept is used in human rights practice, which is the aim of this study.

186 Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?'.

187 Ann Skelton, 'Too much of a good thing? Best interests of the child in South African jurisprudence' (2019) 52 De Jure Law Journal 557, 561.

3 CENTRAL PREMISES OF THE THESIS

3.1 Approaching the best interests of the child from the perspective of human rights law

During the course of the research, I aimed to remain open to different possibilities for interpreting the evidence I studied. Nevertheless, certain central premises affected my perspective and the research design and shaped the research questions. In this section, I describe the four central premises of the study: first, approaching the concept of the best interests of the child from the perspective of human rights law; second, seeing human rights as an agreement; third, building on the findings of previous research regarding the interactions of different systems for the protection of human rights; and, fourth, following the idea that legal reasoning should reflect the underlying reasons for reaching an outcome.

The first premise relates to the angle from which I approach the best interests concept. This thesis belongs to the fields of constitutional law and human rights law. Studying the best interests concept from a human rights perspective is not the only possible angle, of course; children's legal status and rights can be approached from various perspectives. Research concerning the legal status of children has commonly been conducted in the field of family law as children have traditionally been regarded as belonging primarily to the family.[188] Today, the understanding of relevant questions related to children is wider, and children's legal status can be studied in the fields of migration and refugee law, private international law, public international law, tort law and criminal law, to mention just a few.

Human rights law seemed the most fitting approach for this study for four reasons. Firstly, my interest in the best interests concept arises from the discrepancy between the central status of the concept in the CRC and the insecurities regarding how the concept should be understood and how it is being applied in practice. As the CRC is an international human rights convention, it is logical to analyse this discrepancy from the perspective of human rights law. From this perspective, the best interests concept became interesting when it was included in the CRC. Secondly, I find the broad scope of the concept – that is, its applicability in all actions concerning children – particularly salient. The perspective of human rights law provided me with the tools to grasp the comprehensive nature of Article 3(1) CRC and the obligation to apply it in all contexts, not only in the family sphere.

188 For an overview of how the thinking has changed, see eg John Eekelaar, 'The Emergence of Children's Rights' (1986) 6 Oxford Journal of Legal Studies 161; Fortin, *Children's Rights and the Developing Law*, chapter 1.

Thirdly, a human rights law approach enables to analyse the interaction between the international, regional and national, highlighting how international norms are visible in national systems and how the local and regional affect the international. Fourthly, the human rights framework offers tools to analyse issues that are crucial to the best interests concept, such as limiting best interests.

This thesis can be classified as belonging to different research traditions depending on which aspects one pays attention to. The brief literature overview in section 1.1 illustrates the links of this study to previous research on the best interests concept. Many scholars treat children's rights research – a relatively young research area that saw rapid growth from the 1990s[189] – or children's rights law[190] as a field in its own right. I situate this thesis primarily in the broader 'global human rights landscape'.[191] Children have rights as children but also as human beings; as a general rule, all rights enshrined in human rights treaties belong to children, too.[192] Critics such as Cantwell have been concerned that referring to 'children's rights' instead of 'children's human rights' may contribute to isolating these rights and diminishing their importance. It is important to keep in mind that even though research on children's rights – including this thesis – often focuses on the distinct features of children's rights, there are more similarities than differences between the rights of children and adults.[193] However, perceiving (international) children's rights as a distinct field has value in that it directs the formulation of research questions to cover areas that might otherwise be left unexamined. Moreover, recognising children's vulnerability and dependency is important as these are reasons behind the special treatment of children in human

189 Ann Quennerstedt, 'Children's Rights Research Moving into the Future – Challenges on the Way Forward' (2013) 21 The International Journal of Children's Rights 233, 234-235; the finding is based on a search in published peer-reviewed articles on children's rights.

190 Jonathan Todres and Shani M. King, 'Introduction' in Jonathan Todres and Shani M. King (eds), *The Oxford Handbook of Children's Rights Law* (Oxford University Press 2020); Ursula Kilkelly and Ton Liefaard, 'International Children's Rights: Reflections on a Complex, Dynamic, and Relatively Young Area of Law' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer 2018).

191 Eva Brems, Ellen Desmet and Wouten Vandenhole (eds), *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* (Routledge 2017).

192 See eg Article 1 ECHR according to which the contracting states 'shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. 'Everyone' includes children. Article 14 provides that the rights guaranteed in the ECHR shall be secured without discrimination on any ground.

193 Brems, Desmet and Vandenhole (eds), *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?*

rights law. While a broader discussion of vulnerability falls outside the scope of this thesis, it should be remembered that vulnerability is a contested concept.[194]

While this thesis clearly belongs to human rights law, the research questions also have relevance from the perspective of constitutional law. There are different national understandings of what a constitution is,[195] but it is evident that constitutional law and human rights law are closely interlinked. Interaction and dialogue between national, international and regional actors, one of the central premises of the study addressed in section 3.3, strengthens the link between constitutional and human rights law. It has been claimed that it is not possible to consider constitutional, European and international protection systems as sets of differentiated norms,[196] and in several countries, human rights treaties have had a major influence on domestic constitutional reforms.[197] This thesis draws on constitutional law in its interest in constitutional dialogue[198] and cross-references between human rights monitoring bodies or organs. Finnish constitutional law, for example, has become more international and European since the 1990s, after the ratification of several human rights treaties and the strengthening of 'rights-based judicial review'.[199] Regional and international human rights treaties are part of Finland's constitutional order and applicable in courts of law, which formed the rationale of Article I. The findings of this thesis, therefore, are relevant from the perspective of constitutional law as the thesis is situated at the crossroads of national, regional and international norms.

While this thesis primarily focuses on the international and regional levels, it also belongs to the Finnish legal research tradition, the fundamental and human rights research tradition in particular. In the Finnish context, research focusing on children's rights is a relatively new phenomenon. Nieminen published the first

194 Several authors have argued that the concept of vulnerability creates and reproduces hierarchies. Herring, for example, claims that everyone is vulnerable, see Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press 2016). At the same time, it has been argued that vulnerability – especially group vulnerability – can be useful in furthering substantive equality, provided that the concept is not used in a way that assumes that everyone else is fully autonomous and independent, see Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11 International Journal of Constitutional Law 1056.

195 See eg Ingolf Pernice, 'Multilevel constitutionalism in the European Union' (2002) 27 European Law Review 511, 513.

196 Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations' 165.

197 See eg ibid 143.

198 Cheryl Saunders, 'Judicial Engagement with Comparative Law' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Research Handbooks in Comparative Law series, Edward Elgar Publishing 2011).

199 Juha Lavapuro, Tuomas Ojanen and Martin Scheinin, 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review' (2011) 9 International Journal of Constitutional Law 505; see also Juha Lavapuro, *Uusi perustuslakikontrolli* (Suomalainen Lakimiesyhdistys 2010).

domestic monograph on children's fundamental rights in 1990.[200] After that, it took approximately twenty years until the issues incited broader interest,[201] though studies addressing the legal status of children were published in the field of family law[202] but also, for example, migration law.[203] Currently, there is an emerging community of researchers analysing questions relevant to children's rights from different angles.[204]

3.2 Potentially (but not necessarily) good human rights: legal human rights as an agreement

The second premise of the thesis concerns the ontology of human rights. The thesis belongs to the tradition of legal human rights research. Within human rights law, 'human rights' can be approached in several ways, as legal-political claims, binding norms or moral rights that people have 'simply in virtue of being human'[205]. In this thesis, 'human rights' refer to legal human rights as binding norms or an agreement. According to this view, legal outcomes, such as direct application and judicial remedies, follow from legal instruments.[206] This means that the thesis

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200 Liisa Nieminen, *Lasten perusoikeudet* (Lakimiesliiton kustannus 1990); see also eg Liisa Nieminen, 'Lasten perus- ja ihmisoikeussuojan ajankohtaisia ongelmia' (2004) Lakimies 591; Liisa Nieminen, 'Nais- ja lapsikauppa ihmisoikeusongelmana' (2005) 34 Oikeus 130.

201 See eg Suvianna Hakalehto-Wainio, 'Lasten oikeudet lapsen oikeuksien sopimuksessa' (2011) Defensor Legis 510; Suvianna Hakalehto-Wainio and Liisa Nieminen (eds), *Lapsioikeus murroksessa* (Lakimiesliiton kustannus 2013).

202 See eg Kirsti Kurki-Suonio, *Äidin hoivasta yhteishuoltoon: lapsen edun muuttuvat oikeudelliset tulkinnat; oikeusvertaileva tutkimus* (Suomalainen Lakimiesyhdistys 1999), which provides a comparative law approach to the best interests concept. For an overview, see Toivonen, *Lapsen oikeudet ja oikeusturva. Lastensuojeluasiat hallintotuomioistuimissa* 29-31.

203 Eeva Nykänen, 'Protecting Children? The European Convention on Human Rights and Child Asylum Seekers' (2001) 3 European Journal of Migration and Law 315.

204 Eg Lisa Grans, 'Honour-Related Violence and Children's Right to Physical and Psychological Integrity' (2017) 35 Nordic Journal of Human Rights 146; Toivonen, *Lapsen oikeudet ja oikeusturva. Lastensuojeluasiat hallintotuomioistuimissa*; Kirsikka Linnanmäki, *Lapsen etu huoltoriidan tuomioistuinsovittelussa. Lapsioikeutta, sovitteluteoriaa ja empiriaa yhdistävä tutkimus (The Best Interests of the Child in Child Custody Disputes in Court-connected Mediation)* (Alma Talent 2019); Elina Almila, 'Protecting Children from Sexual Violence in Armed Conflict under International Humanitarian Law: Discrepancies between Conventions and Practice of International Criminal Courts and Tribunals' (2019) 10 Journal of International Humanitarian Legal Studies 217; Katarina Frostell, 'Welfare rights of families with children in the case law of the ECtHR' (2020) 24 The International Journal of Human Rights 439; Kirsi Pollari, 'Lapsipotilaan päätöksentekokyky ja sen arviointi' (doctoral thesis, University of Lapland 2019); Hannele Tolonen, Sanna Koulu and Suvianna Hakalehto, 'Best Interests of the Child in Finnish Legislation and Doctrine: What Has Changed and What Remains the Same?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019); Sanna Mustasaari, 'Finnish Children or "Cubs of the Caliphate"? Jurisdiction and State "Response-ability" in Human Rights Law, Private International Law and the Finnish Child Welfare Act' (2020) 7 Oslo Law Review 22.

205 See eg James Griffin, *On Human Rights* (Oxford University Press 2008) 13.

206 Couzens, 'CRC Dialogues: Does the Committee on the Rights of the Child "Speak" to the National Courts?' 121.

does not assume the existence of a moral equivalent for each right guaranteed in a legal document.[207] Instead, human rights are understood as 'a set of universal claims to safeguard human dignity from illegitimate coercion' codified in different sources, including human rights treaties.[208] This thesis further recognises that the formulation of international legal human rights is intertwined with politics and state consent. The drafting of the CRC, for example, is influenced by its time and context and could have led to different formulations of the convention rights.[209]

Why legal human rights and not moral human rights? My relationship with human rights is strained in a way that Dembour captures when describing her 'attraction to and discomfort with the idea of human rights'. She characterises human rights as an 'article of faith' that we intellectually cannot but perhaps should believe in.[210] This thesis does not commit to the view that the right of a child to have his or her best interests taken as a primary consideration would exist as a human right irrespective of its codification in the CRC or other legal instruments. But to describe my attitude to human rights so that I only believe in legal rights is not a correct description of my positionality, either, as I do believe in several ideas underlying the human rights framework, most importantly non-discrimination and social justice.[211]

Human rights have been criticised from several angles.[212] Koskenniemi identifies 'the paradox of an international law that aims to create space for a non-political normativity in the form of human rights that would be opposable to the politics of States but that is undermined by the experience that what rights mean, and how they are applied, can only be determined by the politics of States'.[213] He argues that human rights are necessarily indeterminate and can be used to defend any outcome.[214] The conceptualisation of human rights discourse

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207 According to Buchanan, legal rights do not need to embody corresponding moral rights, and consequently do not need to be justified by appealing to moral rights. See Buchanan, *The Heart of Human Rights* 11.

208 Alison Brysk, 'Introduction. Transnational Threats and Opportunities' in Alison Brysk (ed), *Globalization and Human Rights* (University of California Press 2002) 3.

209 Quennerstedt, 'Children's Rights Research Moving into the Future – Challenges on the Way Forward' 238-239; see also Tobin, 'Justifying Children's Rights' 434.

210 Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press 2006) 1-2.

211 It would also be misleading to address international human rights instruments as completely detached from their moral origins; Besson has noted that the need to pay attention to justifications of human rights derives from, among others, explicit references in international human rights law to the independent existence of moral justifications of human rights, see Samantha Besson, 'Justifications' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd ed. edn, Oxford University Press 2018) 27. This applies to the preamble of the CRC, as well.

212 For a summary of the most common critiques, see eg Justine Lacroix and Jean-Yves Pranchère, *Human Rights on Trial: A Genealogy of the Critique of Human Rights* (Human Rights in History, Cambridge University Press 2018); Dembour, *Who Believes in Human Rights? Reflections on the European Convention*.

213 Martti Koskenniemi, 'Human rights, politics and love' (2001) 19 Mennesker og Rettigheter 33, 33.

214 Ibid 36.

as a legal discourse has also been criticised.[215] Feminist critiques of rights have claimed that as 'rights are a creature of the state and hence a function of existing configurations of power', the potential of rights to challenge prevailing power relations is limited.[216]

This thesis takes the stance that although human rights are not perfect, they are not conceptually flawed, as some critiques claim. Some of such critiques fall prone to the 'perfect solution fallacy', a logical fallacy in which a solution is rejected because it is not perfect.[217] Reducing the world to a pair of extremes does not accurately describe it. Stammers argues that research on human rights is often polarised: 'uncritical proponents' see human rights as necessarily and entirely good, whereas 'uncritical opponents' see them as necessarily and entirely bad.[218] Feminist critiques of rights have been criticised for adopting a privileged perspective; critical race theorists have argued that those who can afford to suggest the refusal of rights rather than their reconstruction are often not among the oppressed.[219] As I see it, while researchers cannot be expected to offer solutions for every issue that they criticise, dismissing human rights because they are not perfect or because the standards enshrined in human rights treaties have not led to an impeccable implementation is not intellectually tenable. In a similar way to Dembour, I see human rights language as a useful tool for in fighting oppressive practices. Legal human rights, however, are not perfect and should not be treated as such, and criticism of human rights should be taken seriously. It is important to remember that 'Human rights are a means to human dignity; as means, they should not be confused with the desired end'.[220] Because human rights is a contested concept, I searched for ways to study the best interests of the child in a way that would describe the object of study and produce new information in addition to making normative claims about it. Human rights practice seemed to provide such an angle.

An approach that focuses on human rights practice is supported by previous research. Landman's methodological work concerning social scientific analysis

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215 Eg Tony Evans, 'International Human Rights Law as Power/Knowledge' (2005) 27 Human Rights Quarterly 1046.

216 Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press 2004) 39; Carol Smart, *Feminism and the Power of Law* (Taylor & Francis 1989) chapter 7.

217 For the concept of the perfect solution fallacy, see eg Kevin M. Clermont, 'Reconciling Forum-Selection and Choice-of-Law Clauses Responses' (2019) 69 American University Law Review Forum 171, 177-178.

218 Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009) 8; in the context of children's rights, see Reynaert, Bouverne-De Bie and Vandevelde, 'Between "believers" and "opponents": Critical discussions on children's rights' 156.

219 Lacey, 'Feminist Legal Theory and the Rights of Women' 41-42; Patricia Williams, *The Alchemy of Race and Rights* (Harvard University Press 1991).

220 David P Forsythe, 'Human Rights Studies: On the Dangers of Legalistic Assumptions' in Fons Coomans, Fred Grünfeld and Menno T Kamminga (eds), *Methods of Human Rights Research* (Intersentia 2009) 75.

of human rights is based on the assumption that 'the social scientific analysis of human rights problems can take place in the absence of agreed philosophical foundations for their existence'. He observes that human rights research is not the only example of conducting social scientific research about an object of inquiry for which there are no agreed philosophical foundations.[221] As Forsythe formulates it, the *results* of believing in human rights can be analysed irrespective of one's beliefs.[222] Even if the reader does not accept my conclusions related to the interpretation of the best interests concept, the empirical data in the articles stands alone – although, as I note in section 4, interpreting texts is always a subjective exercise; a subjective element is present in the systematic or empirical part of the research, too, and cannot be completely detached from it.

Taking legal human rights as a starting point of the study means viewing human rights as agreements between states. The CRC has been ratified by almost all states,[223] and in international law, agreements between states are binding. In many states, such as Finland, the CRC is domestically applicable according to the rules of national law; from the perspective of international law, states are obliged to abide by their international obligations. This obligation derives from Article 26 Vienna Convention on the Law of Treaties (VCLT) titled 'pacta sunt servanda', according to which 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. Following Article 27 VCLT on internal law and observance of treaties, 'A party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty'.

The VCLT also contains the central rules on treaty interpretation in international law. According to the general rule of treaty interpretation in Article 31(1), 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. In other words, it is necessary to take into account the words used, the intention of the parties and the aims of the treaty.[224] The meaning of interpreting treaties 'in good faith' is not entirely clear and, thus, can be discussed: to what extent does a good faith interpretation limit, for example, minimalistic

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221 Landman, *Studying Human Rights* 4-5; Todd Landman, 'The Political Science of Human Rights' (2005) 35 British Journal of Political Science 549, 552-553.

222 Forsythe, 'Human Rights Studies: On the Dangers of Legalistic Assumptions' 59.

223 As of 19 January 2021, 196 states have ratified the CRC, but only 46 have ratified OP3. In addition, the number of reservations to the CRC is high, see Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* 316-317; William A. Schabas, 'Reservations to the Convention on the Rights of the Child' (1996) 18 Human Rights Quarterly 472. No reservations have been made directly with respect to Article 3(1). However, many reservations made with respect to other articles limit the full realisation of Article 3(1), too, for example, that Article 9(1) is interpreted not to apply to cases where the separation of a child from his or her parents results from deportation (Japan). Other examples include a general reservation with respect to all CRC provisions considered incompatible with sharia law (eg Kuwait), and a reservation concerning Article 37(c) that adult penal law can be applied to sixteen-year-olds (Netherlands).

224 Malcolm N. Shaw, *International Law* (8th edn, Cambridge University Press 2017) 707.

interpretations of the CRC, given that the objective of the CRC is to safeguard the human rights of children? At the same time, it has been argued that 'good faith' should not be invoked to impose additional obligations.[225] Interpretation can be understood as an exercise that seeks to establish the 'true meaning' of a legal provision.[226] Several authors have underlined the importance of paying attention to the purpose of the treaty.[227] Naturally, the VCLT rule on treaty interpretation is not an automatic dispenser that issues a correct interpretation if the ordinary meaning, context, object and purpose are fed in. The rules on treaty interpretation reduce indeterminacy and make argumentation more controllable, but the indeterminacy of treaty provisions, including Article 3(1) CRC, cannot be fully eradicated.

Finally, it is important to emphasise that taking legal human rights as a starting point and using them as a benchmark does not mean that one should uncritically accept all the views of human rights treaty bodies. The general comments of the CRC Committee and jurisprudence of the ECtHR should be criticised when there is reason to do so instead of treated with an excessive deference.[228] The CRC is an agreement building on another agreement, childhood,[229] which is based on ideas of human development associated with age as well as on cultural conceptions of children.[230] On the one hand, it has been argued, for example, that the period of special protection of childhood should be extended to 24 years as the brain develops until young adulthood.[231] On the other hand, the CRC's assumptions of children's irrationality and incompetence have been criticised.[232] Recognising the constructed nature of childhood is, therefore, important.

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225 Richard K Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 174-176.

226 As Goodwin-Gill has formulated it in the context of refugee definition, Guy Goodwin-Gill, 'The Search for the One, True Meaning' in Guy Goodwin-Gill and Helene Lambert (eds), The Limits of Transnational Law: Refugee Law, Policy Harmonisation and Judicial Dialogue in the European Union (Cambridge University Press 2010) 216. On treaty interpretation by treaty bodies, see eg Birgit Schlütter, 'Aspects of human rights interpretation by the UN treaty bodies' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012).

227 Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 179; Christel Querton, 'Gender and the boundaries of international refugee law: Beyond the category of "gender-related asylum claims"' (2019) 37 Netherlands Quarterly of Human Rights 379.

228 Coomans, Grünfeld and Kamminga, 'Methods of Human Rights Research: A Primer' 182.

229 See eg Gertrud Lenzer, 'Images toward the Emancipation of Children in Modern Western Culture' in Jonathan Todres and Shani M. King (eds), *The Oxford Handbook of Children's Rights Law* (Oxford University Press 2020).

230 See eg Eugeen Verhellen, *Convention on the rights of the child: Background, motivation, strategies, main themes* (3rd edn, Garant 2000) 11-18.

231 Philip Veerman, 'The Ageing of the UN Convention on the Rights of the Child' (2010) 18 The International Journal of Children's Rights 585, 586.

232 Matías Cordero Arce, 'Towards an Emancipatory Discourse of Children's Rights' (2012) 20 The International Journal of Children's Rights 365.

3.3 Human rights and legal pluralism: interaction and fragmentation

The third central premise of the thesis is the finding of previous research that different systems for the protection of human rights interact with each other. Human rights are protected in a variety of sources at different levels: international,[233] regional and national. The content of human rights treaties overlaps largely, even though differences exist, too. This interaction is sometimes called judicial cross-fertilisation[234] to illustrate the phenomenon of treaty bodies and courts referring to each other's findings. The variety of sources can also be called 'legal pluralism',[235] although the meaning of 'pluralism' is not completely agreed upon.[236] Researchers have analysed comparative constitutional interpretation by national courts where jurisprudence from other states often occupies a central place in adjudication and courts engage in a dialogue with each other.[237] The interaction between different systems protecting human rights has also been compared to a dialogue or a 'conversation between jurisdictions, which are collectively engaged in the task of giving meaning to generally worded human rights provisions whose significance can only be discovered in the course of implementation in a variety of settings'.[238] Despite the overlap in content, however, conventions remain separate: each treaty body has the mandate to monitor its own treaty, and the findings of treaty bodies remain relevant especially for states that have ratified the treaty.

Interaction between the international, regional and national manifests in different ways. Actors of international human rights law, such as UN treaty bodies, refer to each other's findings as well as to findings of regional treaty bodies. International human rights law affects the regional level, even though regional bodies are not bound by UN human rights treaties as such.[239] Slaughter has described the phenomenon of national constitutional courts referring to each other

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233 De Schutter calls UN level 'the universal level'; here, however, I use the term international. See De Schutter, *International Human Rights Law* 14.

234 Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale Law Journal 273, 323-326.

235 See eg Paul Schiff Berman, 'Global Legal Pluralism' (2006) 80 Southern California Review 1155.

236 Samantha Besson, 'European human rights pluralism. Notion and justification' in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press 2014).

237 Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1998) 74 Indiana Law Journal 819.

238 De Schutter, *International Human Rights Law* 38.

239 With the exception of the EU, which has ratified the CRPD. However, according to an established view, intergovernmental bodies are subject to international law, including customary international law. See eg Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 European Journal of International Law 771, 776-781.

'not as precedent, but as persuasive authority',[240] which also illustrates regional bodies' use of general international law. Regional bodies may concretise and develop international norms, and they also instruct states in the implementation of human rights at the national level. The effect is not only top down: states implement international and regional human rights norms on the national level, but national interpretations also shape the formation of international and regional human rights law.[241] Even if national courts have only a limited formal impact on the development of international law, their decisions may be influential in practice.[242] National courts, however, engage with international law on a continuum rather than as an either-or question.[243] The net is, thus, multidimensional, consisting of various relationships both vertical and horizontal. An example of the effect of national interpretations is the 'common ground' between contracting states that the ECtHR often relies on when defining the breath of the margin of appreciation.[244] If several contracting states have interpreted an ECHR right similarly, the margin is narrower, and vice versa.[245]

This thesis focuses on the dialogue between the UN and national systems (Articles I and IV) and between the UN system and ECHR system, as an example of a regional system (Articles II and III).[246] In the Finnish context, at the national level, the human rights-based interpretation of the best interests concept originates from the CRC, a binding treaty incorporated in domestic law. In the ECHR system – commonly considered as a successful system of supranational adjudication[247] – the best interests concept was initially borrowed, but it has acquired more specific content through ECtHR jurisprudence. The interpretations of the ECtHR may

240 Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191, 193; see also Knop, who argues that domestic courts use international law as persuasive rather than binding, Karen Knop, 'Here and There: International Law in Domestic Courts' (1999) 32 NYU Journal of International Law and Politics 501.

241 Krisch argues that the European human rights regime has a pluralist structure, meaning that the relationship between the ECtHR and national courts is not strictly hierarchical but characterised by politics and different actors competing for ultimate authority, see Nico Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 Modern Law Review 183.

242 Antonios Tzanakopoulos and Christian J. Tams, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 Leiden Journal of International Law 531, 539.

243 Couzens, 'The application of the United Nations Convention on the Rights of the Child by national courts' 191; Martin Scheinin, 'General introduction' in Martin Scheinin (ed), *International Human Rights Norms in the Nordic and Baltic Countries* (Nordic Human Rights Publications, Martinus Nijhoff Publishers 1996) 19.

244 Eg *Rasmussen v Denmark*, App no 8777/79, 28 November 1984, para 40.

245 Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) 173-177.

246 The Organization of American States and the Organisation of African Unity also have their respective human rights conventions: the American Convention on Human Rights (ACHR) and the ACRWC.

247 Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication' 293-298.

affect the CRC Committee's views. In addition, the interpretations of the ECtHR may affect the understanding of certain rights at the domestic level.[248]

Interaction between different systems inevitably leads to the question of the universality of rights: is convergence desirable or are different interpretations justified? Fragmentation of international law into separate self-contained regimes is a general phenomenon.[249] Human rights law is usually considered a special branch of international law, but fragmentation also occurs inside human rights law[250] with the result that, for example, the same rights can be understood very differently in different systems.[251] Brems has argued that it would be beneficial for human rights bodies to adopt an integrated view of human rights, one of the constitutive elements being that all relevant human rights provisions in a particular situation are taken into account. Integration does not mean uniformization but rather alignment that leaves room for 'justifiable diversification'.[252] Such an approach receives support from the principle of systemic integration codified in Article 31(3)(c) VCLT, which requires taking into account 'any relevant rules of international law applicable in the relations between the parties' – that is, interpreting treaties in their normative environment.[253] In other words, 'when several norms bear on a single issue, they should, to the greatest extent possible, be interpreted so as to give rise to a single set of compatible obligations'.[254] The principle of systemic integration has been argued to be customary law.[255] Forowicz has distinguished between open and closed paradigms related to the use of international law in the ECtHR. The open paradigm refers to interpretative approaches that advance the use of international law in the ECtHR, whereas the closed paradigm is associated with judicial restraint and preventing international law sources from entering the ECHR system. Forowicz suggests that, on the one hand, the benefits of the open

248 Concerning France, see Couzens, 'The application of the United Nations Convention on the Rights of the Child by national courts' 83-87.

249 International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission. Finalized by Martti Koskenniemi' A/CN.4/L.682 (13 April 2006), paras 129-133.

250 Eva Brems, 'Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration' (2014) 4 European Journal of Human Rights 447.

251 In addition, separate regimes have developed inside human rights law, eg women's rights, rights of persons with disabilities, or rights of older persons. See Brems, Desmet and Vandenhole (eds), *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?*

252 Brems, 'Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration'.

253 For a closer scrutiny of 'systemic integration', see eg Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279.

254 Jean d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing 2012) 148.

255 Ibid 151.

paradigm include better possibilities to harmonise the ECHR with international standards, to reduce fragmentation and to improve the coherence and functioning of the international legal system. The closed paradigm, on the other hand, can strengthen the ECHR system, while isolating the ECHR system from the general international legal order.[256] While many consider aligning interpretations a positive development,[257] it has also been argued that different interpretations of human rights in different systems are crucial for the legitimacy of the human rights project.[258]

I agree with Brems that a better alignment of different systems that encourages different systems to converse and allows general bodies to profit from the findings of specialised bodies is beneficial for the protection of human rights. In this thesis, this starting point is reflected in the comparison of the SAC's and ECtHR's approaches with the CRC system, taking the CRC Committee's views into account. This approach is not to suggest that the CRC has a higher status in the hierarchy of legal sources. As international human rights treaties, both the ECHR and the CRC are equally binding on their states parties, and the CRC does not have primacy in relation to the ECHR. However, it may be argued based on the *lex specialis* rule[259] that the CRC has elevated importance in areas in which it prescribes more specific standards than the ECHR, which is the case in many questions related to children's rights. In addition, the CRC guarantees higher standards in several areas. It can be argued that Articles 3 and 12 CRC, for example, guarantee both a more specific and higher standard.[260]

Even though different levels of human rights protection interact with each other, they remain separate systems. Comparing the SAC, ECtHR and CRC Committee without taking their differences into account would, therefore, be problematic as the mandates of the bodies and, hence, the conclusions that can be reached based on their jurisprudence are different. The SAC is a national court and not a human rights court per se, but it is bound to apply relevant human rights treaties incorporated in Finnish law in addition to relevant national legislation. The ECtHR supervises a regional human rights convention, and its jurisprudence is based on individual applications. The ECtHR is not required to refer to the best interests

256 Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (International Courts and Tribunals Series, Oxford University Press 2010) 4-5.

257 See eg Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication' 373-391.

258 Samantha Besson, 'Comparative Law and Human Rights' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019).

259 Martti Koskenniemi, 'Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes"' ILC(LVI)/SG/FIL/CRD.1 and Add.1 (International Law Commission 4 and 7 May 2004).

260 See Article 53 ECHR: 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party'.

concept nor take the CRC Committee's viewpoints into consideration. However, the ECtHR is an important actor in developing human rights law and has proven on several occasions that it aims to take the CRC into account, which makes it interesting to analyse how its understanding of best interests differs from that of the Committee. However, the ECtHR's jurisdiction is reactive in that as an adjudicatory body, the Court does not have competence to demand better respect for human rights unless it finds a violation of the ECHR.[261]

In contrast to the application-driven nature of the ECtHR, jurisprudence of the CRC is more general in nature, which allows the CRC Committee to develop a more principled approach. At the same time, the Committee's jurisprudence does not offer much guidance as to how abstract concepts operate in concrete situations. Since 2014, however, the CRC has had a mechanism to address individual communications concerning alleged violations of the rights protected by the convention and its optional protocols. In the future, it will be interesting to analyse how the Committee's approach develops with this new dimension.[262] The Committee's COs analysed in Article IV are based on a constructive dialogue between the Committee and states; in issuing recommendations to states, the Committee has to find a balance between respecting national contexts and pushing for change. However, COs are not judgments, as is reflected in their language: the Committee expresses 'concerns' rather than finds violations.[263] Courts, in contrast, 'operate largely with the dichotomy lawful-unlawful'.[264] On the one hand, an advantage of COs is that the Committee can choose more freely the aspects it wishes to comment on. On the other hand, the legal status of the COs is more insecure than that of judgments as the CRC does not accord the Committee express power to adopt binding interpretations of the treaty.[265] It is, however, generally accepted that the views of UN Committees are 'non-binding

261 This observation has previously been made regarding the CJEU, see Ahmed and de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' 795, but it obviously applies to the judicial branch in general.

262 For an analysis of the drafting and content of the OP3, see Gauthier de Beco, 'The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: Good News?' (2013) 13 Human Rights Law Review 367. For analyses of cases concluded under the protocol, see Leiden Children's Rights Observatory, <https://childrensrightsobservatory.nl> accessed 21 January 2021.

263 Brems, 'Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration'.

264 Couzens, 'CRC Dialogues: Does the Committee on the Rights of the Child "Speak" to the National Courts?' 118.

265 International Law Association, Committee on International Human Rights Law and Practice, 'Final Report on the impact of findings of the United Nations human rights treaty bodies' (Berlin 16-21 August 2004) para 18. Cf. the ECHR system where the judgments of the ECtHR are binding, although officially only on the respondent state in question. See Article 46 ECHR; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017) 17.

norms that interpret and add detail to the rights and obligations'[266] contained in the treaty, which means that they have special importance.

3.4 Legal reasoning should reflect the underlying reasons for reaching an outcome

The fourth premise of the thesis is that the explicit legal reasoning should reflect the underlying reasons behind the outcome. In all the articles, I used legal reasoning as a means to study argumentation. As I stated in Article I, the 'study is essentially based on the assumption that the consideration of the best interests should be visible in the legal reasoning of the court'.[267] If that is not the case, it is a problem; the right to receive a reasoned decision is a generally acknowledged right that the ECtHR, for example, has underlined on numerous occasions.[268] The right to receive a reasoned decision can be regarded as one of the aspects of access to justice. Courts are required to provide reasons for their decisions, which means that they have to refer to the legal sources on which their decisions are based. The CRC Committee, too, has underlined the importance of reasoned decisions.[269] While the argumentation in COs cannot be directly compared to reasoning by courts as the function of COs is different from judgments, COs are legal documents and contribute to the interpretation of the CRC.

I discuss the methods of the study in more detail in section 4, but I briefly comment on the method here, too, as the method I used to study jurisprudence was based on the assumption that if a court refers to the best interests of the child, it is likely that the concept is relevant to the reasoning in some respect. Of course, a reference in itself does not explain why and to what purpose the concept was used, making it necessary to analyse the matter further.[270] In Article I, I had to define what it means for a court 'to consider' best interests and made a typology of four categories according to the level of reference to best interests, with one

266 This observation was made with respect to the Human Rights Committee in Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their Legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 131.

267 Article I, 162.

268 See eg *Hirvisaari v Finland*, App no 49684/99, 27 September 2001, para 30; *Tatishvili v Russia*, App no 1509/02, 22 February 2007; *Regner v Czech Republic*, App no 35289/11, 19 September 2017, paras 113-114.

269 GC14, para 97.

270 See also Couzens, 'The application of the United Nations Convention on the Rights of the Child by national courts' 14, who notes that detecting the effect of the CRC (as opposed to national legislation) in the reasoning of national courts can be difficult.

category consisting of cases in which best interests had been considered without a reference to them.

A common objection to examining case law in the way I did is that courts of law only refer to the necessary sources; if national law already contains the relevant standards, there is no need to refer to international obligations. From this perspective, it can be debated whether references to best interests (or other human rights obligations) are a necessary part of the reasoning or rather an icing on the cake. Indeed, in most cases, the Constitution of Finland guarantees a higher level of human rights protection than the minimum standard provided by human rights treaties,[271] but the Constitution does not contain an obligation to consider the best interests of the child. Even if a judgment does not refer to the best interests concept, the judgment should substantively and procedurally be in line with the requirements of Article 3(1) CRC. In the materials I studied, this was often not the case, or the reasoning was too scarce to even assess whether best interests had been considered. Such cases are problematic from the perspectives of both human rights and legal certainty.

Another concern of analysing legal argumentation is that the reasoning can never fully reflect the rationale that underlies the outcome. Courts and human rights treaty bodies are affected by a need to delicately address controversial issues, as Holzscheiter has noted regarding UN documents.[272] Moreover, the 'real' purpose of the Committee or a court commenting on a certain issue cannot be discovered by simply reading the final version of a judgment or a CO. Strategic considerations, such as those related to legitimacy, affect the argumentation. Nevertheless, studying legal reasoning, what is included and what is not, can reveal substantial information about the meanings accorded (and not accorded) to the best interests of the child.

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271 Lavapuro, Ojanen and Scheinin, 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review' 516; Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations' 159-160; the constitutional provision specifically protecting children is section 6(3), according to which 'Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development'. It is common for human rights treaties to contain a provision expressing the 'principle of favour', that is, the idea that the convention does not limit higher standards of domestic law or other international agreements, see eg Article 41 CRC and Article 53 ECHR. See Samantha Besson, 'Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights?' (2016) 61 The American Journal of Jurisprudence 69-107, 82.

272 Holzscheiter, *Children's rights in international politics: The transformative power of discourse* 95.

4 METHODOLOGICAL APPROACH AND MATERIALS

4.1 Doctrinal but critical

Legal researchers often state that method has not been central for their approach; in fact, it is not uncommon for legal researchers to claim that they have no method or to not address method at all.[273] However, there is no research without a method, and communicating the method clearly is important to enable assessment of the reliability and validity of the research. In this section, I present the methodological approach of the thesis[274] and discuss three central methodological choices: firstly, taking a doctrinal approach; secondly, using systematic case studies to find where the problems lie; and thirdly, using comparison and contrasting to highlight the problems. Doctrinal research is in many respects the most traditional type of legal research. Systematic case studies and comparison, however, deserve more attention. They are not new methods as such, but labelling them as methods is not common in legal human rights research. Because I have benefited from other researchers' honest reflections on their work, I find it important to show how these approaches can be used to find new information and highlight problematic developments in the materials studied.

When conducting research on human rights, it is crucial to distinguish between how things are, how they could be and how they should be: while empirical theories aim to explain and understand certain phenomena, normative theories focus on how things ought to be.[275] Interpretation of legal norms is an objective traditionally associated with the doctrinal method in legal research.[276] A researcher with a doctrinal research interest aims to interpret legal norms in relation to others, essentially from an internal perspective.[277] Legal doctrine has been described as

273 Eg McCrudden has made that observation, see Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 Law Quarterly Review 632, 646.

274 Methodology has been defined as a 'generic term for choice of approach, sometimes connected to theoretical understandings and conceptual paradigms'; method 'refers to the specific approach selected, such as quantitative or qualitative methods along with particular analytical tools' where 'tools' are components of a method. See Bård A Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford, 'Human rights research method', *Research Methods in Human Rights* (Edward Elgar Publishing 2017) 1-2.

275 Landman, *Studying Human Rights* 36.

276 Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 4.

277 McCrudden, 'Legal Research and the Social Sciences' 633-634.

a 'discipline which takes normative positions and makes choices among values and interests'.[278]

This thesis has a doctrinal research interest as it assesses the studied human rights practice in light of the normative framework of human rights law. One of the aims of this thesis is to analyse the ways in which the best interests concept interacts both with human rights, including children's own rights and interests and the rights of other persons, and with competing interests, such as the state's interest in controlling immigration. This aim contributes to the interpretation of the best interests concept. Empirical observations concerning trends in case law (or other elements in the materials analysed) do not alone form a basis for critiquing these trends. Hume famously noted the distinction between 'is' and 'ought' propositions:[279] empirical reality does not reveal how things should be. Critique takes place from a certain standpoint, which in this study is the human rights framework and its underlying principles.

Doctrinal approaches to legal research have some pitfalls, including the value-laden nature of interpretation. Normative claims are more vulnerable to criticism related to justifications of human rights than approaches not taking a normative stance. The value-tied nature of interpretation does not mean, however, that interpretation should not take place at all but, rather, that the beliefs affecting and forming the interpretation should be clearly expressed.

The fact that there are underlying assumptions behind every interpretation makes the idea of an overarching, correct interpretation more difficult. However, the existence of underlying assumptions does not necessitate interpretation nihilism, either, namely the idea that all interpretations are equal. In light of international human rights law, some interpretations are better than others. Some interpretations clearly conflict with a human rights norm; some conflicts are less immediately obvious but still evident after a careful examination. Of course, this is not to say that international human rights law is an entirely unified field. The views of human rights treaty bodies change over time, and human rights bodies sometimes err, disagree with each other and depart from earlier precedents. International human rights law also suffers from internal conflicts, and different understandings of rights – such as regarding the scope of rights and differences between civil-political and ESC rights[280] – lead to varied interpretations of the

278 Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' 10.

279 David Hume, *The Complete Works and Correspondence of David Hume. A Treatise of Human Nature* (InteLex Corp. first published 1739) 469-470.

280 Compare eg George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007), who argues that the ECHR should be interpreted as imposing restrictions on state action, emphasising civil and political rights, and Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 Human Rights Law Review 529.

correct interpretation of, for instance, the scope of the protection of family life. There are diverse understandings of rights even within bodies that produce international human rights law.[281] Nevertheless, international human rights law, as a sub-discipline of law, has certain starting points, which include a commitment to ratified human rights obligations.

Before moving to discuss systematic case studies in detail, I want to underline that a study with doctrinal elements has to be critical, too; a doctrinal approach does not mean accepting everything as a given fact. All research is supposed to be 'critical' in that questioning the object of study is crucial for any research project.[282] Reynaert, Bouverne-De Bie and Vandevelde understand 'critique' in the context of children's rights research 'as a practice of questioning and analysing presuppositions underlying practices in the broad field of children's rights'.[283] In this thesis, I do not use the term 'critical' to refer to, for example, to Critical Legal Studies or to critical approaches to international law.[284] Nevertheless, keeping one's underlying assumptions in mind, re-evaluating the materials studied and not taking them for granted is extremely important, though difficult. In a contested field such as human rights, the importance of being critical is all the more crucial. It has been argued that a pitfall of human rights scholarship is that the research aim is to improve respect for human rights standards, which may lead to viewing human rights standards in an idealised light and forgetting that, as results of negotiations between states, human rights instruments are not perfect.[285] Children's rights research has, likewise, been criticised for being insufficiently critical of the CRC framework as well as for a lack of theorisation and contextualisation.[286] I attempt to avoid these pitfalls by not taking the interpretation of the actors studied for granted and by analysing their shortcomings, too.

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281 See eg Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* 17 regarding the ECtHR.

282 Panu Minkkinen, 'Critical legal "method" as attitude' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2017) 119.

283 Reynaert, Bouverne-De Bie and Vandevelde, 'Between "believers" and "opponents": Critical discussions on children's rights' 156.

284 Note that there is no such thing as 'a' critical approach; critical legal method is rather a cluster of approaches. See Martti Koskenniemi, 'Letter to the Editors of the Symposium' (1999) 93 American Journal of International Law 351, 352-353.

285 Coomans, Grünfeld and Kamminga, 'Methods of Human Rights Research: A Primer' 182.

286 Quennerstedt, 'Children's Rights Research Moving into the Future – Challenges on the Way Forward'; Reynaert, Bouverne-De Bie and Vandevelde, 'Between "believers" and "opponents": Critical discussions on children's rights'; Didier Reynaert, Maria Bouverne-de-Bie and Stijn Vandevelde, 'A Review of Children's Rights Literature Since the Adoption of the United Nations Convention on the Rights of the Child' (2009) 16 Childhood 518.

4.2 Zooming out: using systematic case studies to produce new knowledge and discover the problems

A central contribution of this thesis lies in the systematically collected data on the nature and functioning of the best interests concept in human rights practice. As such, the thesis provides new information about how an indeterminate concept is understood in concrete cases. Some patterns that I identified have been recognised in earlier research; in those cases, the systematic approach allowed to confirm these findings. Most materials of this thesis had not been studied earlier at all.

Human rights research has been criticised for not being based on accurate sources and for only opting for sources that support the argument taken while deliberately ignoring sources that do not. According to a study analysing 90 articles in the field of legal human rights research, omission of information on the selection criteria used to choose the analysed case law was common. In examining ECtHR jurisprudence, for instance, authors often did not specify whether the whole body of judgments had been examined nor whether inadmissibility decisions were included in addition to decisions on the merits, preventing readers from assessing the validity of the conclusions.[287] As has been pointed out, it would not make sense to assess the performance of a soccer team that had won three games and lost 40 by only focusing on the wins. The losses and ties have to be taken into account, too.[288] According to Hirschl, commenting on comparative constitutional law, a common way of approaching legal research is 'studying the legal forest through a detailed examination of some of its individual trees'. He claims that although such examination may be valuable, it does not allow establishing causal links nor developing explanatory knowledge. Paying closer attention to research design and case selection helps in 'making valid inferences that go beyond the particular observations collected'.[289] Despite these critical perspectives, several examples of systematic studies exist in the field of human rights law.[290]

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287 Eva Brems, 'Methods in Legal Human Rights Research' in Fons Coomans, Fred Grünfeld and Menno T Kamminga (eds), *Methods of Human Rights Research* (Intersentia 2009) 87-89.

288 Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* 21, quoting Mathias Möschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence "Beyond Reasonable Doubt"?' (2012) 12 Human Rights Law Review 479, 497.

289 Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 228-230; however, see Katharine G Young, 'On What Matters in Comparative Constitutional Law: A Comment on Hirschl' (2016) 96 Boston University Law Review 1375, 1383, who argues that as law is normative and prescriptive, explanation and establishing causation may not be valid goals for legal research.

290 See eg Maija Dahlberg, '"It is not its task to act as a Court of fourth instance": the case of the ECtHR' (2014) 7 European Journal of Legal Studies 84; Frostell, 'Welfare rights of families with children in the case law of the ECtHR'; Janneke Gerards, 'Procedural Review by the ECtHR: A Typology' in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017); Noam Peleg, *The Child's Right to Development* (Cambridge University Press 2019); Saïla Ouald Chaib, 'Procedural Fairness as a Vehicle for Inclusion in the Freedom of Religion Jurisprudence of the Strasbourg Court' (2016) 16 Human Rights Law Review 483.

While landmark cases often receive close scrutiny for a good reason, for this thesis, I wanted to zoom out first to decide what to examine more closely. Comprehensiveness of the analysis was the key to avoiding an arbitrary choice of cases, that is, only choosing those cases that support my argument and ignoring some important but less-known developments. As Ragin observes, examining many cases 'provides a way to neutralize each case's uniqueness'.[291] Systematic case studies helped me follow my research interest of searching for the unexpected.

The method of this study can also be characterised as empirical and, more precisely, as qualitative empirical legal research. In previous literature, an 'empirical trend' in international law scholarship has been noted, which refers to research 'exploring how and under what conditions international human rights law works in practice'.[292] I have borrowed elements of quantitative methods, too, especially in Article I, where I calculated the percentages and numbers of cases that display certain developments and presented the quantitative results according to category and case type in two figures.[293] Ragin divides the research strategies of social research into three groups, though the division is not meant to be comprehensive: qualitative research focusing on commonalities in a small number of cases, quantitative research focusing on relationships among variables in a large number of cases, and comparative research exploring diversity in an intermediate number of cases in a comprehensive way.[294] Of these three, my research falls in the category of comparative research. I discuss the comparative aspects further in section 4.3.

I called the method 'systematic case studies' in Article I where I analysed SAC case law; in the other articles, which also rely on a systematic approach to case law (ECtHR case law in Article II and jurisprudence of the Committee on the Rights of the Child in Article IV), I did not name the method. In all the four articles, however, I described what I did, which is the essence of 'a method' at its simplest: which materials I used, from which period and what index words I employed to obtain the materials, as well as the limitations of the method. The approach is comprehensive as I obtained a selection of cases or documents using certain predefined criteria. By describing the process, I intended to give the reader the information necessary to repeat the study and, subsequently, to validate the

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291 Charles C Ragin, *Constructing Social Research: The Unity and Diversity of Method* (Sage 1994) 35.

292 Stéphanie Lagoutte, 'The Role of State Actors Within the National Human Rights System' (2019) 37 Nordic Journal of Human Rights 177, 180; Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 The American Journal of International Law 1.

293 Article I, 164-165. As Landman formulates it, quantitative methods are used to display differences in number between the objects studied, and qualitative methods are used to find differences in kind. Landman, *Studying Human Rights* 70-71.

294 Ragin, *Constructing Social Research: The Unity and Diversity of Method* 47-52.

results. Verbalising the limitations makes the approach vulnerable to criticism, but it is fair to give the reader the tools to assess the approach.[295]

However, it is important to remember that even a systematic approach is not free of subjectivity. Interpreting a text is a subjective exercise. Koskenniemi argues that the existence of a neutral standpoint or framework is an illusion; from this follows that 'there is no (credible) external perspective on "method"'.[296] It is important to keep this concern in mind when reflecting on the methods used. Even if selection criteria are clear, applying them to judgments involves interpretation.[297] In qualitative research in general, defining the methods of analysis in an exact way is difficult. My interpretation of the materials is affected by my positionality as well as other, more incidental factors, such as the order in which I read the cases and, consequently, the connotations that I drew between them.

A systematic approach seemed particularly fitting to study Article 3(1) CRC as the provision should be applied in all actions concerning children – that is, in every case concerning children regardless of the case group. My choice of index words varied depending on the research question and materials. In Article I, I wanted to include all cases concerning children because the SAC is obliged to apply international human rights obligations binding upon Finland, such as the CRC. I did not use 'best interests' as an index word as the aim was to detect all cases concerning children, including those in which the court did not refer to best interests. This approach enabled me to locate instances not only in which the court referred to the exact term but also in which children's interests appeared to play some kind of role in the reasoning even though the term was not used. Because the ECtHR does not have such an obligation, I used narrower index words in Article II and included cases in which the ECtHR itself used the term best interests. This was appropriate to the article's aim of analysing the ECtHR's understanding of the best interests concept. I used a similar approach in Article IV where I examined the CRC Committee's views.

Of course, a comprehensive approach is not necessary for all research questions, and the research questions should determine the method.[298] In Article III, I examined the procedural trend that I noticed when conducting research on ECtHR case law for Article II. The objective of Article III was to use that trend as an illustration of a broader – and, as I claimed in the article, more fundamental

295 On the importance of enabling others to assess the validity of the outcome, see Coomans, Grünfeld and Kamminga, 'Methods of Human Rights Research: A Primer' 184-185.

296 Koskenniemi, 'Letter to the Editors of the Symposium' 352-353.

297 Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' 13.

298 Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 8-9; Landman, *Studying Human Rights* 58.

– phenomenon of courts relying on procedural instead of substantive arguments. But to make broader claims, collecting the cases systematically is often crucial.

Because of large amounts of relevant case law, it was not possible to discuss every case in the articles. Consequently, I had to make choices concerning which cases I presented in detail. When choosing which cases to cite, I was guided by three main ideas. Firstly, I tried to choose representative cases. By representative, I mean that they effectively illustrated the trend or trends of a particular type of case law. Secondly, when faced with several representative cases with similar legal argumentation, I usually cited the newest.[299] This was both because case law develops and because, especially in the case of the ECtHR, readers are likely to be more familiar with older cases that have been subject to more academic analysis. Thirdly, I cited cases that appeared to me particularly striking or worrying from the point of view of children's rights.[300] Even with these three guidelines in mind, I followed my own judgement and not a mathematical formula when choosing cases. Very often, other examples could have been cited to support my argument. In instances where I made a tentative claim based on a small number of cases, I expressed that definitive conclusions cannot necessarily be made.[301]

One limitation of the method is that I did not systematically study temporal trends in the materials; this study approaches the body of jurisprudence as a whole. Nevertheless, I tried to detect temporal trends as well as I could, for example, by observing that the COs of the CRC Committee have become more specific over time.[302] Despite not systematically tracking temporal trends, I aimed to take into account instances in which the ECtHR, for example, has changed its approach. I also paid attention to whether important judgments are reflected in later case law, such as whether *Jeunesse*, an immigration case in which the ECtHR acknowledged in general the importance of best interests in cases concerning removals of non-national parents,[303] has been referred to in subsequent jurisprudence.

As discussed above, I initially relied on systematic case studies to be comprehensive. As it turned out, the approach had other benefits, too. A systematic approach to collecting cases proved especially useful for a study focusing on the rights of vulnerable groups as systematically researching cases led to uncovering hidden practices and discriminatory patterns. In this sense, using systematic case studies allowed me to identify where the problems lie. Another benefit of

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299 Eg in Article IV, I cited recent COs, when possible.

300 Eg in Article II, concerning the ECtHR case *Kissiwa Koffi v Switzerland*, App no 38005/07, 15 November 2012, where the ECtHR paid no attention to the views of the child, who was also an applicant. See Article II, 265-266.

301 Eg in Article II, 262, where I argued, based on two ECtHR cases and previous research, that the emphasis on the ethnic origin of the deportees or their family members raises concerns about discrimination.

302 Article IV, 115.

303 *Jeunesse v the Netherlands* [GC], App no 12738/10, 3 October 2014, para 109. See Article II, 258-259.

a systematic approach was how examining the materials shaped my thinking. Collecting and reading case law systematically was time-consuming, but genuinely interesting observations, such as the benefits of a procedural approach to best interests in the ECtHR, largely occurred after an analysis of empirical materials. I felt that I needed to zoom out to be able to zoom in again. Otherwise, the focus might have been on the wrong things.

4.3 Zooming in: using categorisation, comparison and contrasting to find differences, highlight problems and offer alternatives

The third important methodological choice was comparison and contrasting. Comparative research studies 'patterns of similarities and differences within a given set of cases'.[304] Comparing two things is, of course, not a new idea in legal research, and comparative law is a well-established field. Comparative constitutional law, for instance, has long traditions.[305] However, comparative law is state-orientated: the objects of comparative law are usually different legal systems[306] or two temporal periods in the same country.[307] Even though some texts display a broader understanding of comparison in general[308] or suggest, for instance, that the increasing role of non-state actors[309] or globalisation[310] challenges the traditional understanding of state-centric comparative law, comparative law's focus on different legal systems is often taken as a given,[311] even in contributions that take a critical stance towards conventional ways of conducting comparative legal research.[312]

The comparison I used in this thesis refers to a comparison between any distinct but similar enough issues. In Articles I and II, I compared case groups

304 Ragin, *Constructing Social Research: The Unity and Diversity of Method* 106.

305 See eg Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011).

306 See eg Jaakko Husa, *A New Introduction to Comparative Law* (Bloomsbury Publishing 2015); Mathias Siems, *Comparative Law* (Law in Context, 2nd edn, Cambridge University Press 2018).

307 Bård A Andreassen, 'Comparative analyses of human rights performance' in Bård A Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing 2017) 222-223.

308 Nils Jansen, 'Comparative Law and Comparative Knowledge' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019).

309 Mathias Siems, 'New Directions in Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 870-871.

310 Horatia Muir Watt, 'Globalization and Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019).

311 Ginsburg and Dixon (eds), *Comparative Constitutional Law* 1.

312 Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar Publishing 2019).

and different fields of law. Studying the best interests concept on the international, European and national levels also led to more traditional comparisons between legal orders.[313] To my knowledge, labelling comparison as a method is not common in the human rights context, even though it is obviously often used. I find naming the method important as comparison is an efficient tool when trying to understand differences in the level of human rights protection and helps uncover things that we take as given when there is no counterpoint.

Human rights scholarship contains some striking examples of using comparison in the way I described above: as a tool to highlight problems in the level of human rights protection. My understanding of comparison as a method is indebted largely to Dembour, who has compared the approaches of the ECtHR and the Inter-American Court of Human Rights (IACtHR) in migrant cases and found a contrasting bias; in considering two regional systems, her approach has elements of what is traditionally understood as comparative law. Dembour uses the choices made in the IACtHR system 'strategically, as a counterpoint to the Strasbourg migrant case law, in order to further the (…) principal aim, which is to provide a critical assessment of the Strasbourg case law'. She explains her approach with the metaphor of 'two differing fruits of human rights law'. Even though an orange cannot become an apple, both fruits have enough in common for comparing them to make sense:

> [i]t is nonetheless enlightening to decipher their respective qualities and features, and to compare them, in the same way as one might wish to compare the vitamin content, texture, and flavour of different species of fruit. Having said this, it would also be a mistake to approach each system as a fixed entity rather than a continually developing process which has the capacity to be both internally imaginative and to borrow elements which have emerged elsewhere'.[314]

I find the last point important because it touches upon my reasons for using comparison as a method. Before using any method, it is important to ask why this specific method should be used. Why compare these two issues in the first place? This question connects back to the starting point of this thesis, which is to analyse the concept of the best interests of the child as an international legal human right and to critique human rights practice, when relevant, from this perspective. My purpose in contrasting approaches to the same right in two different fields of law has been to show that the current situation is not a 'fixed entity' and has potential

313 For an account of comparative human rights law, see Besson, 'Comparative Law and Human Rights'.

314 Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* 17.

for development. Imagining how things could be otherwise can be difficult, but comparison shows that there are options. An established human rights practice that might seem like the only option can suddenly appear problematic when contrasted with another practice.

Related to this point, other interesting examples exist of previous research that uses comparison to highlight problems in the level of human rights protection. Spijkerboer has contrasted how states protect the right to life in the fields of aviation law, maritime law and law on migrant smuggling, finding that states differentiate in the level of protection, with, unsurprisingly, the lowest level of protection in migrant smuggling. His comparison enables to see that the situation is 'not a matter of structural or conceptual necessity but a consequence of human acts, which can be changed'.[315] Wessels has discovered a 'territorial bias' in ECtHR case law concerning domestic violence by comparing cases of women seeking international protection in a Council of Europe (CoE) state and women subjected to domestic violence in their CoE home state. In addition to the territorial bias, she discovered a gender bias in different standards of risk assessment for men and women in non-refoulement cases. She uses the distinction between 'internal' and 'external' cases to 'draw out dissonances in human rights protection for "us" (member States of the CoE) and "them" (elsewhere)'. The same standards should apply to all, but the case law displays an inconsistency regarding the obligation arising from Article 3 ECHR.[316]

I spoke above of 'highlighting problems'. Before contrasting two issues to uncover problems, it is necessary to define which perspective one needs to take to see the 'problem' as a problem. As Koskenniemi expresses in the context of comparative international law – that is, comparing national approaches to international law – one needs a 'point of reference from which to examine rival regimes and conflicting preferences'.[317] In this sense, comparison as a method presupposes committing to certain beliefs. For a firm believer in the primacy of state sovereignty, Spijkerboer's comparison, mentioned above, would not make sense. In this thesis, international legal human rights form the 'point of reference' for criticising differences in the level of human rights protection.

In addition to the point of reference, another precondition for conducting a comparison is defining what is being compared or which units are being studied. The aim of comparing can only be decided after a careful consideration of the

315 Thomas Spijkerboer, 'Wasted Lives. Borders and the Right to Life of People Crossing Them' (2017) 86 Nordic Journal of International Law 1, 29.

316 Janna Wessels, 'The boundaries of universality – migrant women and domestic violence before the Strasbourg Court' (2019) 37 Netherlands Quarterly of Human Rights 336, 338-339, 348, 358.

317 Martti Koskenniemi, 'The Case for Comparative International Law' (2009) 20 Finnish Yearbook of International Law 1, 7.

available materials that have been obtained in a reliable way. In Article I, I made my own categorisation of SAC judgments and divided the materials into four categories according to the level of reference to best interests. Category 1 cases contained a reference to Article 3(1) CRC; category 2 cases contained a reference to best interests but not to Article 3(1) (to distinguish between a rights-based and potentially not rights-based understanding); category 3 cases contained some reflection on the children concerned but no reference to best interests; and category 4 cases showed no indications of best interests consideration at all. I also categorised the cases in six groups according to case type: aliens,[318] child welfare, primary education, reimbursements, environmental permits, and others. I then quantitatively assessed the divisions into case types and reference categories.

In Article II, I compared the ECtHR's child protection and immigration jurisprudence. The categories of child protection and immigration cases follow the facts of the case as defined by the ECtHR. This categorisation did not involve my own assessment as it was usually clear what the central legal question was.[319] I initially used the term 'child welfare' in ECtHR cases, too, but then settled for 'child protection', as the former is not as commonly used in English contributions.[320] In Article III, I used Brems's categorisation of three types of a substance-flavoured procedural approach in the ECtHR and showed how these categories are visible in the ECtHR's procedural approach to best interests. In Article IV, I classified the CRC Committee's approach to best interests in two ways: firstly, by classifying the contexts where the best interests concept appears (eg vulnerable groups), and, secondly, by identifying six cross-cutting themes focusing on measures that states need to take to implement Article 3(1). Categories are always a simplification of reality, but keeping that in mind, they potentially reveal new aspects about the object of the study.

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318 The main Act concerning foreign nationals is called the Aliens Act (301/2004), from which this strange name derives. The Act regulates the legal status of non-Finnish citizens residing in Finland. For an unofficial English translation of the Ministry of the Interior, Finland (amendments up to 1163/2019 included), see <https://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf> accessed 21 January 2021.

319 There were, however, some borderline cases that could perhaps be classified as adoption cases rather than child protection cases, for example, *Zhou v Italy*, App no 33773/11, 21 January 2014. In *Zhou*, the mother complained about the adoption of her son, who had first been placed in an institution and then adopted. Nevertheless, the ECtHR also assessed the previous decisions concerning the son's placement as it considered them crucial for the assessment. For a discussion of what constitutes 'related proceedings' in this sense, see *Strand Lobben and others v Norway* [GC], App no 37283/13, 10 September 2019, concurring opinion of judge Ranzoni, joined by judges Yudkivska, Küris, Harutyunyan, Paczolay and Chanturia.

320 Eg Asgeir Falch-Eriksen and Elisabeth Backe-Hansen (eds), *Human Rights in Child Protection. Implications for Professional Practice and Policy* (Springer 2018); see, however, Kenneth Burns, Tarja Pösö and Marit Skivenes, *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (Oxford University Press 2017). For a somewhat different use of 'child protection', see Conor O'Mahony, 'Child Protection and the ECHR: Making Sense of Procedural and Positive Obligations' (2019) 27 The International Journal of Children's Rights 660. O'Mahony uses 'child protection' to refer to cases concerning 'protecting children from abuse and neglect at the hands of private actors' decided primarily under Articles 3, 2 and 13 ECHR and sometimes under Articles 4 and 8.

4.4 Materials of the study

In this section, I discuss the primary sources of each article in more detail. The primary sources of Article I are listed at the end of the article, and the primary sources of Articles II and IV are included at the end of this thesis as appendices. The primary sources of Article III are not listed separately as the article does not aim to be comprehensive but illustrates a trend with relevant examples, which are cited in the article. Article IV also contains a table that lists in more detail the concerns and recommendations of the CRC Committee in each area.[321]

The materials of Article I consisted of 72 cases of the SAC. The materials were obtained by searching Finlex, the main database of Finnish case law, with Finnish equivalents of 'child' and 'minor' and their conjugations because my aim was to obtain all cases concerning children.[322] The time limit was from 2001 to 2014. The materials of the study included published judgments only as published are generally considered more relevant than unpublished judgments.[323] I classified the cases, documenting which category they belonged to. I concentrated on the court's reasoning and did not evaluate compliance with procedural requirements; I did not, for instance, systematically observe whether the child had an opportunity to express his or her views.[324]

In Article II, I searched the Human Rights Documentation (HUDOC) database with index words containing the words 'best interests' in English and French. Unlike in Article I, I did not include all judgments concerning children but judgments where the ECtHR has used the best interests concept; in contrast to national courts, the ECtHR is under no obligation to refer to the best interests concept. Therefore, I wanted to focus on the concept of the best interests of the child as the ECtHR itself understands and applies it. The materials contain the Chamber and Grand Chamber judgments concerning child protection and immigration until the end of 2017, comprising 65 child protection and 43 immigration cases, with a total of 108 cases.[325] I documented different aspects of each case during

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321 Article IV, Table 1: Summary of issues that the Committee on the Rights of the Child connects to the best interests of the child.

322 For a more detailed description of the method, see Article I, 161-162.

323 For the SAC's publication policy, see 'Päätösten julkaisukäytäntö' [Publication policy of the Supreme Administrative Court of Finland] <https://www.kho.fi/fi/index/paatokset/julkaisuohje.html> accessed 21 January 2021.

324 Article I, 163.

325 I did not automatically consider Grand Chamber cases more significant than Chamber cases but, rather, paid attention to the Court's argumentation. As Lavrysen has noted, the authoritative value of a case is not determined solely by the composition of judges; cases that are frequently cited in later jurisprudence have more authoritative value. From this follows, too, that the Court's whole jurisprudence should not be criticised 'on the basis of a cherry-picked judgment or decision that may not be representative of the broader jurisprudence'. See Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016) 40-41.

the research process.[326] As no starting date limit was used, the materials contain all the judgments in the two case groups with a reference to the best interests of the child. I excluded immigration detention cases because the best interests assessments in them had less in common with child protection cases than with first entry and expulsion cases, which often focus on whether the child can be separated from his or her parents.[327]

In Article III, I partly relied on the materials of Article II and, additionally, conducted searches of recent case law (years 2018 and 2019) in which the ECtHR referred to best interests. Case law was followed until 31 December 2019. I documented factors similar to those detected in the materials of Article II as well as whether the ECtHR's approach could be characterised as procedural or not.[328] As Article III does not aim to prove that the procedural approach has replaced the substantive approach in the ECtHR, the materials are not intended to be a comprehensive collection of ECtHR cases in which a procedural approach has been relied on or of case law concerning best interests.[329] Instead, the article first detects and then explores the phenomenon of the Court increasingly relying on procedural arguments.

Article IV is based on a systematic analysis of relevant parts of all the 556 COs the CRC Committee issued between 1993, when it began to consider state reports, and 2019, excluding COs based on separate reports concerning the two optional protocols of the CRC. The jurisprudence was followed until 16 December 2019. I downloaded the COs from the Office of the United Nations High Commissioner for Human Rights (OHCHR) webpage, searched them with index words (variations of 'best interests' as well as 'Article 3') and traced different aspects of each document.[330] I tracked instances in which the Committee has referred to best interests because the aim was to analyse the Committee's understanding

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326 In Article II, I traced the following factors: case name, type (Chamber or Grand Chamber), application number, date of judgment; subject matter; identity of the applicant (to identify which family members were applicants); children concerned (to identify how the children concerned were positioned in relation to the applicants); articles under which the ECtHR considered the case; whether a violation was found (and if yes, of which articles); competing interests; whether the case was unanimous or vote; whether the CRC was referred to (and if yes, which articles); cases referred to when considering best interests; and issues best interests were connected to. Regarding some cases, I made additional observations (additional category 'other').

327 For a more detailed description of the method and index words used, see Article II, 250-251.

328 I characterised the cases as substantive, procedural or partly procedural and made additional remarks related to the nature of the case.

329 As briefly discussed in the article, the ECtHR has, in several cases, relied on the substantive approach and sometimes expressly refused procedural arguments. See Article III, 748.

330 I traced the following factors: state concerned; title and date of the concluding observation; sections under which best interests were assessed (here, the finding was sometimes 'no references to best interests'); relevant paragraphs referring to best interests (as many columns as needed; I copied here the relevant paragraphs to be able to easily verify the dictions later); whether best interests were referred to as a 'principle' or not; and documents referred to in relation to best interests, for instance, general comments of the CRC Committee.

of the concept; the analysis does not, therefore, catch possible instances where the Committee discusses relevant issues without using the term or referring to Article 3. A benefit of searching with these index words is that the analysis is not limited to issues the Committee has discussed under Article 3(1) but extends to all relevant issues regardless of the context. As state reports fell beyond the scope of the article, the analysis does not reveal whether the Committee correctly interpreted a situation in a certain country or reacted similarly to similar problems in different states. The extensive amount of materials allowed the identification of cross-cutting themes that are not visible when analysing individual COs.

As the materials I studied were publicly available documentary sources, I did not have to consider issues related to privacy or research ethics when designing the research. It is crucial to keep in mind, however, the sensitivity of this study's area of focus. Court cases are legal documents but, in reality, they are about the problems and suffering of real human beings whose experiences differ from how those experiences are portrayed in legal documents. A verdict of violation may advance the development of future case law and bring justice to others but not always to the applicant; for example, in a case where the ECtHR found a violation of Articles 3 and 5(1) in respect to four children who had been detained together with their mother after their asylum claim was rejected, the applicants disappeared after being deported to another country and apparently never received the compensation awarded to them as their legal representative could not reach them.[331] The ethical use of knowledge is another important consideration. Categorising is helpful but can also enforce existing structures if the categories are taken as a given and not questioned.

331 *Muskhadzhiyeva and others v Belgium*, App no 41442/07, 19 January 2010. See Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* 393-394.

5 MAIN FINDINGS: THE BEST INTERESTS OF THE CHILD IN HUMAN RIGHTS PRACTICE

5.1 National courts: uneven application in the SAC

In this section, I discuss the findings of the thesis, presenting the main results of each article separately. Article I, '"In All Actions Concerning Children"? Best Interests of the Child in the Case Law of the Supreme Administrative Court of Finland', presents a Finnish example of how the best interests concept is understood and used by national courts of law. The article evaluates the application of the best interests concept in the case law of the SAC by analysing whether best interests have been considered in judgments concerning children concluded between 2001 and 2014. It examines whether the SAC has considered best interests in the way required by Article 3(1) CRC, that is, by making best interests a primary consideration and paying attention to the relevant human rights of children. In addition, the article explores whether best interests have been understood differently in different contexts.

I wanted one of the sub-studies to focus on a national context for two reasons. The first is the importance of implementation of rights at the domestic level. Several authors have argued that the effectiveness of human rights standards depends on the extent to which they are domesticated.[332] Courts play an important role in this domestication. As Tobin has formulated it, 'While the role of the judiciary is by no means the only, nor even necessarily the most, important element in the overall scheme of enforcement measures, it nonetheless provides a very strong indication of the extent to which the relevant international norms have been internalised and brought to life within the domestic legal system'.[333] Judges are instrumental in translating international human rights into the domestic context, and the role of national courts in protecting CRC standards has been underlined

332 See eg Kirsten Sandberg, 'The Role of National Courts in Promoting Children's Rights: The Case of Norway' (2014) 22 The International Journal of Children's Rights 1, 1; Trude Haugli and Elena Shinkareva, 'The Best Interests of the Child Versus Public Safety Interests: State Interference into Family Life And Separation of Parents and Children in Connection with Expulsion/Deportation in Norwegian and Russian Law' (2012) 26 International Journal of Law, Policy and the Family 351, 372; in the ECHR system, the principle of subsidiarity originates from the same idea. Implementation on the national level is not always straightforward; a study concerning the ECtHR found that there is sometimes a direct relationship between a verdict of violation and domestic action leading to compliance, but in other cases, the relationship is more indirect. Alice Donald and Anne-Katrin Speck, 'The Dynamics of Domestic Human Rights Implementation: Lessons from Qualitative Research in Europe' (2020) Journal of Human Rights Practice 1.

333 John Tobin, 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children' (2009) 33 Melbourne University Law Review 579, 580.

in previous research.[334] It is important to note the challenging nature of that role. As Couzens has formulated it, national 'courts are bound by their institutional position to identify the CRC's legally enforceable dimension, which is not always easy, considering the multi-dimensional nature of the Convention'.[335] National courts' different characteristics also have a bearing on the extent to which they can engage with the CRC and respond to its violations.[336]

The second reason for analysing national case law was the vertical relationship between national courts and states' international human rights obligations. States parties have an obligation to implement the CRC. However, the role of national courts in implementing the CRC can be conceptualised from two differing viewpoints: international law and the domestic constitutional framework.[337] Under international law, states are free to decide how they implement their treaty obligations,[338] and Article 4 CRC advises that 'States parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention'. Unlike the provisions of several other human rights conventions, Article 4 does not explicitly require access to remedies in case of violations but leaves the role of courts for national law to decide.[339] However, the CRC Committee has emphasised the role of courts, recommending comprehensive measures called 'general measures of implementation' (GMIs),[340] which advise states how CRC provisions should be implemented, and consistently underlining the role of courts in providing remedies when other branches of government fail to implement the CRC.[341] Furthermore, the importance of considering best interests in decision-making is accentuated by the wording of Article 3(1), which explicitly refers to courts and can be applied without national provisions concretising its content.[342]

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334 Jonathan Todres, 'Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law' (1998) Columbia Human Rights Law Review 159, 160.

335 Couzens, 'CRC Dialogues: Does the Committee on the Rights of the Child "Speak" to the National Courts?' 103.

336 Couzens, 'The application of the United Nations Convention on the Rights of the Child by national courts' 7. This intuitively makes sense but can be easily forgotten.

337 Ibid 18-47.

338 See eg Sean D. Murphy, 'Does International Law Obligate States to Open their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?' in David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009).

339 Couzens, 'The application of the United Nations Convention on the Rights of the Child by national courts' 19-20; see also Ton Liefaard, 'Access to Justice for Children: Towards a Specific Research and Implementation Agenda' (2019) 27 The International Journal of Children's Rights 195.

340 See General Comment no 5 on the general measures of implementation.

341 For a review, see Couzens, 'The application of the United Nations Convention on the Rights of the Child by national courts' 25-28.

342 Ibid 23.

I chose Finland as an example of a national context mainly because it is the jurisdiction I am most familiar with. However, Finland also makes an interesting example as the CRC is domestically applicable in Finland. Finland takes a dualist approach to international law, which means that additional incorporation measures are needed for a ratified treaty to become formally part of the Finnish legal order.[343] Section 94 of the Constitution of Finland, which concerns the acceptance of international obligations and their denouncement, forms the basis for making international obligations as part of domestic law.[344] Finland ratified the CRC in 1990, and it was incorporated through an ordinary act of parliament that entered into force in 1991. Because Finland has incorporated the CRC into domestic law, the CRC can be invoked before courts of law similarly to all legislation.[345] Even though human rights treaties (other than the ECHR) mainly acquire judicial effect indirectly by interpreting national legislation through human rights treaties,[346] direct references should be encouraged. The SAC seemed a relevant context for this study as the use of public powers in administrative matters underlines the importance of taking fundamental and human rights into account.

In addition to being domestically applicable, human rights treaties have a 'semi-constitutional status' in the Finnish legal system.[347] According to section 22 of the Finnish Constitution titled '[p]rotection of basic rights and liberties', 'The public authorities shall guarantee the observance of basic rights and liberties and human rights'. The provision underlines the similarities between domestic fundamental rights and international human rights and, therefore, makes human rights obligations constitutionally special.[348] Section also 22 emphasises the active role of public authorities in implementing human rights; the word 'guarantee' corresponds to the obligations to protect and fulfil human rights in the tripartite

343 Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations' 151; Martin Scheinin, 'Domestic Implementation of International Human Rights Treaties: Nordic and Baltic Experiences' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 229.

344 Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations' 155. For an unofficial translation of the Constitution (731/1999) by the Ministry of Justice (amendments up to 817/2018 included), see <https://www.finlex.fi/en/laki/kaannokset/1999/en19990731> accessed 21 January 2021.

345 Tolonen, Koulu and Hakalehto argue that international human rights instruments have significantly influenced the interpretation of the best interests concept in Finland, see Tolonen, Koulu and Hakalehto, 'Best Interests of the Child in Finnish Legislation and Doctrine: What Has Changed and What Remains the Same?'

346 Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations' 156-157; Lavapuro, Ojanen and Scheinin, 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review' 513.

347 Scheinin, 'Finland' 276.

348 Scheinin, 'Finland' 276; Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations' 155. On the Finnish system of constitutional review, see Lavapuro, Ojanen and Scheinin, 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review'.

classification of state obligations.[349] Section 22 further forms the basis for the interpretive effect of human rights treaties when interpreting national legislation. In accordance with section 22, the SAC has to guarantee the observance of human rights in its jurisprudence.

Finnish courts, therefore, have the obligation to abide by Article 3(1) and other CRC provisions. Consequently, Article I focuses on the broadness of the obligation to consider best interests 'in all actions concerning children'. As explained in section 4.4, the research question required including all the relevant cases where the SAC should have considered best interests. After obtaining the cases concerning children, I divided them into four categories according to how extensively and explicitly the SAC had considered best interests. I then used the four categories to analyse differences between case groups, comprising aliens, child welfare, primary education, reimbursements for disabled children, environmental permits and other cases.

Article I made three central claims. Firstly, it demonstrated that Article 3(1) CRC was referred to in 12.5% of the cases; best interests were mentioned without referring to Article 3(1) in 29.2% of the cases; best interests were considered without mentioning the term in 30.6% of the cases; and no indications of a best interests consideration was evident in 27.8% of the cases. Even though best interests were referred to or considered in 72.2% of the cases, the quality of the reasoning was poor in several decisions where best interests were expressly mentioned. In many of the cases in which best interests were not considered at all, the connection to children was not recognised by the SAC.

Secondly, the article showed that there are significant differences between case groups in the extent to which best interests were considered. The SAC has considered best interests regularly in cases concerning aliens and in child welfare cases, occasionally in cases concerning primary education and reimbursements and never in cases concerning environmental permits.[350] The comparison indicates that often best interests are not considered in cases not traditionally associated with children's rights. This is true even for certain case groups that concern children directly, such as primary education.

Thirdly, the study found that best interests were referred to more often in areas where they are mentioned in the applicable law or its travaux préparatoires, such as Aliens Act and Child Welfare Act.[351] This finding suggests that the CRC

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349 Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013).

350 For the exact quantitative results, see Article I, 165-173.

351 For an unofficial translation of the Child Welfare Act (417/2007) of the Ministry of Social Affairs and Health, Finland (amendments up to 1292/2013 included), see <https://www.finlex.fi/fi/laki/kaannokset/2007/en20070417.pdf> accessed 21 January 2021.

Committee is right to recommend a comprehensive integration of best interests into national legislation.

The finding that best interests are often not referred to is in line with previous research. Regarding the SAC's aliens-related cases, Pirjatanniemi has found that the reasoning starts from national legislation; the SAC pays attention to human rights but subordinates them to the national legislator.[352] Ojanen has observed regarding the domestic effects of international human rights norms that Nordic courts, including Finnish, most commonly give judicial effect to human rights treaties indirectly, by using the human rights-oriented interpretation approach. Direct application of human rights treaties is less common for treaties other than the ECHR.[353] In Article I, cases where the SAC has referred to best interests without referring to Article 3(1) CRC and cases showing some best interests consideration without referring to the term can be interpreted as representing the human rights-oriented interpretation. As I noted in the article, however, it is often unclear whether the SAC interprets best interests in a rights-based way. Overall, studying argumentation proved challenging, as the reasoning was often meagre.

In retrospect, I see the aliens-related cases as giving more reason for criticism than I perceived at the time of writing Article I. Even though best interests, even Article 3(1), are referred to in cases concerning aliens on a relatively regular basis – and much more often than in other case groups because all but one reference to Article 3(1) were aliens-related cases – many aliens-related cases can be criticised for not substantively aligning with the best interests of the child.[354] In child welfare cases, however, the role of best interests is significant and hearings are sometimes organised, even though Article 3(1) is usually not referred to. In alien-related cases, most references to Article 3(1) occurred in cases concerning the income requirement;[355] in contrast, the connection to children was not recognised in most international protection cases.[356] Some income requirement cases were problematic, too, as I argued in Article I, because they lean towards a narrow

352 Elina Pirjatanniemi, 'Muukalaisia ja muita ihmisiä [Aliens and other people]' (2014) Lakimies 953, 970-971.

353 Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations' 156-157.

354 See eg an analysis of KHO:2013:97, a family reunification case in which an Algerian father was not granted a residence permit: Sanna Mustasaari, 'Best interests of the child in family reunification – a citizenship test disguised?' in Anne Griffiths, Sanna Mustasaari and Anna Mäki-Petäjä-Leinonen (eds), *Subjectivity, Citizenship and Belonging in Law Identities and Intersections* (Routledge 2016).

355 According to section 39(1) of the Aliens Act, 'Issuing a residence permit requires that the alien has sufficient financial resources unless otherwise provided in this Act. In individual cases, a derogation may be made from the requirement if there are exceptionally serious grounds for such a derogation or if the derogation is in the best interest of the child'.

356 See Article I, 167, and examples mentioned there.

interpretation of best interests that focuses on some rights only, such as the right to health.[357]

The relationship between considering best interests and referring to them is subtle. Article I shows that considering best interests does not equate to referring to them, but referring to best interests is an indication of considering them. As I stated in Article I when introducing the categories, 'Referring to Article 3(1) is an indication of paying attention to the CRC and rights guaranteed by it'.[358] But, unfortunately, a reference sometimes stands alone without deeper argumentation or genuine consideration. My current view is obviously affected by what I have learned since writing Article I. In particular, encountering numerous examples in ECtHR case law in which argumentation based on best interests did not result in favourable outcomes for the applicant made me more pessimistic regarding the SAC's reasoning, too. In the materials of Article I, Article 3(1) was the decisive argument in one case only, which signals that the provision may often be invoked to support an outcome that would have been reached anyway based on other norms. Article 3(1) was considered only after national legislation, which is standard but may limit the scope of the provision and, thus, the role best interests play.[359] At the same time, referring to the CRC can be considered useful even if it is not engaged with very deeply; references to the CRC arguably contribute in any case to increasing its visibility, legitimacy and domestic value, creating space for future judgments to engage more extensively with the CRC.[360]

The most recent year that Article I covers is 2014. While it is not possible to provide a comprehensive account of later jurisprudence here, I highlight here some subsequent developments. I would have assumed that human rights treaties would be better taken into account in newer case law, but the case law does not seem to support such a view. A recent review of the SAC's immigration jurisprudence found that even though best interests were mentioned in most cases concerning children, references to the CRC were few in recent years; best interests were often briefly mentioned without engaging in balancing interests, and there was no clear trend towards a more frequent consideration of best interests.[361] Nevertheless, positive developments exist, too, for instance KHO 2017:81 concerning international protection in which the SAC referred to a general comment of the CRC Committee for the first time. The case concerns an Iraqi asylum seeker and his fourteen-year-

357 Article I, 175; see also 178.

358 Article I, 163.

359 Article I, 178-179.

360 Couzens, 'The application of the United Nations Convention on the Rights of the Child by national courts' 78, 136, 192-194.

361 Anni Pietarinen, 'Lapsioikeudelliset näkökulmat korkeimman hallinto-oikeuden ulkomaalaisasioiden ratkaisuissa vuosina 2005-2019' (Master's thesis, University of Helsinki 2020).

old[362] son who had been refused asylum. The applicants claimed that the son should have been heard. The SAC referred to Articles 3(1) and 12 CRC and cited at length GC14 in which the CRC Committee explains its threefold understanding of the best interests concept and emphasises the connection between Articles 3 and 12, as well as General Comment no 12 on Article 12. The Court also referred to the latest COs to Finland in which the Committee recommended hearing children in judicial and administrative procedures concerning them. According to section 6 of the Finnish Aliens Act, a child of at least twelve years old shall be heard before a decision is made concerning that child unless such hearing is manifestly unnecessary. The section also specifies that the child's views must be taken into account in accordance with the child's age and level of development and establishes the possibility of hearing sufficiently mature younger children, too. The SAC held that Articles 12 and 3(1) CRC have to be taken into account when assessing the obligation to hear the child. The approach taken is procedural: the Court did not investigate whether the criteria for granting international protection were met but returned the case to the Immigration Service as the child had not been reserved an opportunity to be heard.

Before moving on, I would like to draw attention to one more interesting finding of Article I that was a by-product of the method used. The finding is related to the scope of the best interests provision and has more general implications. To analyse whether best interests had been adequately considered, I had to decide which cases I classified as 'actions concerning children' in the meaning of Article 3(1) CRC, which was the criterion for deciding whether a case was to be included in the materials of the article. No definition exists for that expression other than the CRC Committee's guidance that the expression must be understood broadly: every action, direct or indirect, concerns children. A broad understanding of 'action' that encompasses acts and omissions by both private and public actors further expands the definition. Determining whether a case concerned children is crucial for the scope of the provision and, consequently, proved important from the perspective of the connection between best interests and human rights. I realised that when determining whether a case concerned children or not, I had to assume a connection between best interests and human rights even at that early stage of the research, during the selection of cases, before the actual analysis could take place.[363] I find this 'scope test' important: it reveals that best interests and human rights are interconnected by showing that if a link to human rights is not assumed, the requirement to consider best interests does not make sense. From this follows that, in fact, best interests are not applicable in all cases concerning

362 Fourteen at the time of the decision of the Immigration Service.

363 Article I, 161.

children, but they are applicable in all cases concerning children's human rights. This, of course, does not prove that best interests equate to human rights, but it strengthens the link between them.

To summarise, Article I found that the SAC considers the best interests of the child more in some case groups than in others. In areas not traditionally associated with children's rights, a case concerning children was often not recognised as such. Alien-related cases contained the most references to best interests, but the substantive outcomes of several decisions in this category can be criticised from the point of view of children's rights. The quality of the argumentation was the best in child welfare cases. The findings of the article support the inclusion of a comprehensive reference to best interests in the legislation. The article addressed the Finnish context, but it is likely that similar inconsistencies between case groups exist in the case law of other national courts, too.

5.2 The problematic approach of the ECtHR in migrant cases

In Article II, 'A comparison of child protection and immigration jurisprudence of the European Court of Human Rights: what role for the best interests of the child?', I analysed the best interests of the child in a context in which the concept did not originally belong: the ECHR system. As explained in section 4.4, Article II is based on a systematic examination of ECtHR case law, that is, all child protection and immigration cases in which the Court has referred to the best interests of the child. The article compares how the Court understands and uses the concept of the best interests of the child in its child protection and immigration judgments.

Reading the ECHR as a text only partially reveals the scope of human rights protection that has emerged based on it. Through its case law, the ECtHR constantly updates the ECHR and gives meaning to the provisions.[364] The ECtHR regularly uses the CRC to guide the interpretation of the ECHR, which has been considered a positive development.[365] The starting point for researching ECtHR case law in Article II was that the best interests concept has an established status in the jurisprudence of the ECtHR, as found in previous research.[366] It should

364 In doing so, the ECtHR relies on interpretative approaches, such as evolutive and dynamic interpretation, the effectiveness principle, systemic integration and judicial activism. See eg Forowicz, *The Reception of International Law in the European Court of Human Rights* 11-13; Gerards, *General Principles of the European Convention on Human Rights*.

365 Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 Human Rights Quarterly 308; concerning the Inter-American system, see Monica Feria-Tinta, 'The CRC as a Litigation Tool Before the Inter-American System of Protection of Human Rights' in Ton Liefaard and Jaap Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2015).

366 See Article II, 250 and references there.

be noted, however, that the Court's use of the best interests concept is currently limited to Article 8 cases, with some exceptions in Article 3, 5 and 6 cases.[367] All contracting states of the ECHR have ratified the CRC, so it can be argued that a consensus exists for interpreting the ECHR in light of the CRC. It has been suggested that the best interests concept opens a door for integrating children's interests into the argumentation of the ECtHR in cases where children are not applicants.[368] Vandenhole and Türkelli have contended that the ECtHR often uses the best interests concept as 'a proxy for children's rights' to read CRC provisions into the ECHR, especially in juvenile justice and migration cases.[369] However, Fenton-Glynn has claimed that the ECHR is an 'ill-fitting instrument' for the protection of children because, among other reasons, the convention system does not conceptualise children as individual subjects of rights.[370]

In Article II, I wanted to explore the convergence and divergence between the CRC and ECHR systems by analysing whether the interpretation of best interests by the ECtHR differs from that of the CRC Committee. In addition to the ECtHR's frequent reliance on the best interests concept, central reasons for researching ECtHR case law were the case-by-case nature of how the ECtHR functions and the binding nature of ECtHR cases. Because the ECtHR operates based on individual applications, it is forced to address the concrete circumstances of those cases. The CRC Committee now handles individual communications, too, but the volume of cases concluded by the Committee based on OP3 was low at the time of writing Article II.[371]

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367 Eg *MP and others v Bulgaria* App no 22457/08, 15 November 2011, where the Court held that domestic authorities had not failed to meet their positive obligations under Article 3 to effectively investigate allegations of sexual abuse of the child and to remove him from the home. The Court considered that domestic authorities had thoroughly assessed the best interests of the child and sought to protect them. The approach was thus procedural. In Article 3 migrant cases, relying on the concept is rare; for an exception, see the immigration detention case *Kanagaratnam and others v Belgium*, App no 15297/09, 13 December 2011. In *RP and others v the UK* App no 38245/08, 9 October 2012, the Court held that the fact that the official solicitor representing the applicant, a disabled parent, considered the best interests of the child when deciding how to act did not breach Article 6. The applicant had argued that there was a conflict of interest between her and the child. Article 5 cases are immigration detention cases, see Article III for more detail.

368 Vibeke Blaker Strand, 'Interpreting the ECHR in its normative environment: interaction between the ECHR, the UN convention on the elimination of all forms of discrimination against women and the UN convention on the rights of the child' (2019) The International Journal of Human Rights 979, 985; Lydia Bracken, 'Assessing the best interests of the child in cases of cross-border surrogacy: inconsistency in the Strasbourg approach?' (2017) 39 Journal of Social Welfare and Family Law 368, 375.

369 Wouter Vandenhole and Gamze Erdem Türkelli, 'The Best Interests of the Child' in Jonathan Todres and Shani M. King (eds), *The Oxford Handbook of Children's Rights Law* (Oxford University Press 2020) 210.

370 Fenton-Glynn, 'Children, parents and the European Court of Human Rights' 644-647.

371 The Committee's jurisprudence is slowly developing: as of 21 January 2021, the Committee has considered 53 communications, most of which have resulted in inadmissibility or discontinuance decisions, and has given its views in 16 cases. According to a table of pending cases updated 19 October 2020, 62 cases where pending before the Committee, of which Article 3 has been invoked in 55 communications. See Committee on the Rights of the Child, 'Table of pending cases' (19 October 2020) <https://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf> accessed 21 January 2021.

GC14 sets the stage for researching ECtHR case law in an interesting way. While reading the general comment, I wondered how the all-encompassing obligations described there would translate into practice. In the general comment, the CRC Committee expresses that the best interests of the child have to be balanced on a case-by-case basis and that no general instructions can be given regarding how to balance rights, as I discussed in section 2.4. In the ECtHR, the best interests concept usually appears in the context of balancing of interests at the necessity stage of the Court's analysis. By analysing ECtHR case law, I wanted to examine concrete examples of whether balancing could be achieved in practice while respecting the rights of the child.

Why limit the study to child protection and immigration cases? I initially intended to analyse all areas in which the ECtHR has used best interests in its argumentation – ranging from custody cases to cases concerning the right to education – to obtain a full picture. Eventually, I had to limit the analysis because the volume of the case law was too vast for one article. Even after narrowing the research question, the final selection of cases that the article is based on, which comprises 65 child protection cases and 43 immigration cases, is extensive. Before deciding what to exclude, I skimmed hundreds of cases to understand what kind of role best interests play in the argumentation and to select a meaningful entry point.

As it turned out, narrowing the research was easier than what it first seemed due to a simple observation. When reading the cases, I began to notice patterns of argumentation and repetitive references to interpretations established by the Court itself in previous cases. One specific case group, however, stood out in a way that could not be ignored. The migrant cases[372] were different.

In other case groups, too, there were competing rights and interests, which is unsurprising as court cases are often about balancing. In migrant cases, those other interests were, as a rule, given priority over the best interests of the children concerned. Best interests were sometimes decisive, but these cases were often treated as exceptions in subsequent cases. Although the ECtHR frequently expressed as a general rule that best interests are paramount in cases concerning children, this rule did not frequently hold when applied to the facts of the case. Even in certain cases decided for the applicant, it proved difficult to assess whether best interests had had a genuine effect on the outcome or whether they were invoked to support a conclusion reached through other arguments.

The findings of Article II can be summarised as follows. The main finding is that the ECtHR assesses the best interests of the child differently in child

372 In Article II, I used the term 'immigration cases'; here, I use the terms 'immigrant' and 'migrant' interchangeably to refer to all categories of people migrating from one state to another, including asylum-seekers and refugees.

protection and immigration cases. Some of the differences are explained by the different nature of child protection and immigration cases and some differences are common sense, such as focus on physical integrity in child protection cases and ties with the host country or country of origin in immigration cases. However, others cannot be explained by the different nature of the case groups and, therefore, appear unjustified in light of Article 3(1) CRC.

I argued in Article II that three patterns demonstrate these problematic differences. Firstly, the child's right not to be separated from his or her parents is treated differently in child protection and immigration cases. Family unity is the Court's starting point in child protection cases, in accordance with Article 9 CRC, but not in immigration cases; in the latter group, the Court examines separately whether it is in the best interests of the child to live with his or her parents. The divergent default position leads to discrepancies in that preserving ties is privileged in child protection cases but not in immigration cases.[373] The burden of proof is also different. Secondly, the age of the child has different implications in the two case groups: in child protection cases, young age is associated with care needs, whereas in immigration cases, young age signals 'adaptability'. An 'adaptable' child is considered capable of adapting to a country even with non-existent ties there. This often applies to children nationals of the respondent state, too. Thirdly, obtaining children's views and giving them due weight has been important in several child protection cases but rarely in immigration cases, including those in which the child is an applicant.

The article concludes that the approach of the ECtHR in immigration cases is problematic from the perspective of the best interests of the child. In immigration cases, incidental factors, such as the parents' relationship status, often determine whether the child can enjoy his or her right to respect for family life.[374] I argued in Article II that the ECtHR should take family unity as its default position in all case groups and require the state to justify its immigration control measures. I also made suggestions to make argumentation in ECtHR immigration jurisprudence more child-friendly. These recommendations included deliberately referring in immigration cases to judgments from other case groups. Even though it is common

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373 Article 9 CRC sets criteria for not separating the child from his or her parents unless necessary for the best interests of the child (Article 9(1)), participation in the proceedings (9(2)), and maintaining relations with parents (9(3)). In addition, Article 25 CRC provides that 'States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement'. Article II found that the ECtHR's scrutiny covers all the stages present in these provisions in child protection cases: the initial separation from parents, maintaining relations, participation in the proceedings and national authorities' efforts to end the placement when possible. The approach in child protection cases also follows the guidelines reflected in the CRC Committee's COs, see Article IV, 108.

374 More on this point, see Article II, 261.

for the ECtHR to refer to other case groups when it lays out the applicable general principles, references are rarer when the Court examines the facts of the case. As I discussed in the article, the Court has stated that the procedural requirements it identifies in child-care cases apply in 'any judicial or administrative proceedings affecting children's rights under Article 8'.[375] Instead of perceiving cases as blocks such as 'immigration case' or 'custody case', the ECtHR could start its reasoning from seeing children as children. Furthermore, I suggested that the structure of Article 9 CRC could also be applied to immigration cases as the Court already applies it to child protection cases. Article II strongly supports reasoning in which best interests are connected to relevant rights. Similarly, the article supports assessing the content and weight of best interests separately. It ends by challenging the current understanding of public interest or state interest as synonymous with immigration control.

That ECtHR migrant cases lack the child focus of other areas is not a new observation; Kilkelly made it already in the late 1990s, in what was the first comprehensive study on the ECHR and children.[376] Some recent studies have likewise focused on the problematic and inconsistent nature of newer ECtHR case law concerning first-entry and expulsion.[377] ECtHR case law concerning removals and child welfare has also been analysed,[378] as has the Court's case law concerning protecting children from ill-treatment.[379] There is a certain overlap between my approach and these previous publications, with the previous findings on child protection case law and on the problematic nature of ECtHR migrant case law concerning children setting the stage for my findings in two ways. Firstly, Kilkelly's early discovery makes it even more vital to analyse current case law to ascertain whether the pattern she identified still holds. Article II makes it clear that it does; in twenty years, the migrant case law has evolved surprisingly little. Secondly, migrant cases have not been systematically compared with other cases in previous research. My article fills this gap by bringing together two discussions and unveiling the differences between migrant cases and other cases; though I focus on child protection cases, the argumentation in these cases bears a

375 Article II, 267; *M and M v Croatia*, App no 10161/13, 3 September 2015, 181.

376 Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate 1999) 219-221; see also Nykänen, 'Protecting Children? The European Convention on Human Rights and Child Asylum Seekers' 327.

377 Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?'; Leloup, 'The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency'; Leloup, 'Some Reflections on the Principle of the Best Interests of the Child in European Expulsion Case Law'; Mark Klaassen, 'Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases' (2019) 37 Netherlands Quarterly of Human Rights 157.

378 Skivenes and Søvig, 'Judicial Discretion and the Child's Best Interests: The European Court of Human Rights on Adoptions in Child Protection Cases'.

379 O'Mahony, 'Child Protection and the ECHR: Making Sense of Procedural and Positive Obligations'.

resemblance to several other case groups. Although lowering the level of human rights protection would not be any more acceptable even if the same lowering occurred for other groups of people, the comparison shows that children are treated in a discriminatory manner depending on their immigration status (or that of their parents). Even though this difference is unsurprising, it can only be confirmed through a systematic analysis of case law.

There are counterarguments to the approach, of course. One can argue that it is normal to handle migrant cases differently from, say, custody, child abduction or child protection cases; according to this argument, migrant cases *are* different because the interests of the state in immigration control are so prominent that there is nothing wrong with prioritising them over the rights of migrants. Indeed, this is the most common objection to the approach: why compare two areas that are inherently so different? I do not claim that the assessment of best interests in child protection and immigration cases should be identical. Nevertheless, there are similar relevant questions in both case groups, concerning whether an interference in family life is justified and whether a child can be separated from his or her parents. Even though child protection and immigration cases differ in several important respects, they have numerous commonalities and comparing them demonstrates how differently the same rights are approached depending on the case group. As I discussed in Article II, Dembour has convincingly questioned the well-established nature of the 'well-established principle in international law' that entitles states to control the entry of foreigners into their territory and with which the ECtHR starts its reasoning in migrant cases, thus exhibiting the 'Strasbourg reversal' instead of starting the reasoning with the applicable provision. This reduces Article 8 ECHR to an exception, which effectively limits its applicability.[380] Article II asks to what extent human rights limits can be positioned differently in different areas and aims to show that the current choices made by the Court in immigration cases are not the only possible ones.[381] Another counterargument to the approach of Article II is that it conflates the differences between positive and negative obligations. The problems of distinguishing the two types of obligations are discussed in section 6.4; suffice to say here that the Court's decision to attach different consequences to positive and negative obligations is a normative distinction and, thus, not the only option.[382]

Article II showed that the human rights protection that migrant children receive in the ECtHR through argumentation related to the best interests concept is weaker

380 Article II, 251; Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*.

381 For a more detailed discussion of comparing the two case groups, see Article II, 251; for general reflections on comparison as a method, see section 4.3 of this summary.

382 Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* 282-284.

than the protection received by children in the context of child protection. This implies that the best interests concept has not succeeded in its goal of safeguarding the human rights of children and raises the question of how the situation could be improved. As I argued in Article II, child protection case law shows that the ECtHR could walk another path in immigration cases, too. However, treating migrant cases differently seems to be a general phenomenon. Drywood has criticised EU asylum and immigration law for a lack of child-centeredness: despite a breadth of provisions regulating children's legal status, children in these cases are considered primarily as asylum-seekers and not children, their rights are limited and children in families are overlooked.[383] A previous study comparing the decision-making of courts in migrant cases and child protection cases in the Finnish context discovered similar results: migrant cases involving children are predominantly decided on other factors whereas the best interests assessment in child protection cases is central.[384] A study comparing a small number of criminal law and immigration law decisions of the Norwegian Supreme Court found that children's rights were 'upheld to a greater extent with regard to children in conflict with the law than for children trying to immigrate'.[385] Article I revealed this difference, as well, showing that assessment of children's best interests was more child-centred in child welfare cases where children's views, for instance, were considered more important than in migrant cases. Inconsistencies between different fields of law seem to be a broader phenomenon. A study analysing age limits in juvenile justice, family law and care proceedings and migration law found that different standards are applied in the different fields.[386] Another study focusing on children's access to judicial proceedings found that provisions in the areas of family and placement in care tend to be more rigorous than other areas of law. This selective approach restricts the extent to which children can enjoy their procedural rights.[387]

One of the findings of Article II, the parallels that the ECtHR draws between young age and care needs when assessing best interests in child protection cases, is partly based on the Chamber judgment in the case of *Strand Lobben and others v Norway* in which the applicant's son had been taken into emergency care as a baby and later placed in long-term care. Consequently, the boy had spent his whole life in

383 Eleanor Drywood, 'Challenging concepts of the "child" in asylum and immigration law: the example of the EU' (2010) 32 Journal of Social Welfare and Family Law 309.

384 Hiitola and Pellander, 'The Alien Child's Best Interest Ignored: When Notions of Gendered Parenthood Meet Tightening Immigration Policies'. See also Mustasaari, 'Best interests of the child in family reunification – a citizenship test disguised?' 129, who argues that the context in which the best interests assessment is conducted is decisive to how the decision-maker constructs the child's interests.

385 Sandberg, 'The Role of National Courts in Promoting Children's Rights: The Case of Norway' 19.

386 Stephanie Rap, Eva Schmidt and Ton Liefaard, 'Safeguarding the Dynamic Legal Position of Children: A Matter of Age Limits?' (2020) Erasmus Law Review 4.

387 Naomi Kennan and Ursula Kilkelly, *Children's involvement in criminal, civil and administrative judicial proceedings in the 28 Member States of the EU* (European Union 2015) 5.

the foster family. The case concerned the authorities' refusal to lift the care order, the revocation of the applicant's parental rights and the non-consensual adoption of the son by the foster parents.[388] Soon after Article II was published, the Grand Chamber overturned the Chamber judgment. Similarly to the Chamber judgment, the Grand Chamber referred to the General Comment on young children[389] in which the CRC Committee underlines young children's dependency and the critical importance of early childhood for the realisation of children's rights. Despite this, the Grand Chamber judgment does not offer substantive advice regarding young children's care needs as the reasoning focused on other aspects of the case. It is, therefore, left to future case law to develop the Court's stance. I discuss *Strand Lobben* in more detail in section 6.6 because the case is relevant to the discussion concerning a procedural approach to human rights protection.

Article II makes two recommendations that are developed further in Article III: firstly, suggesting that the ECtHR pay attention to whether national authorities have respected the child's right to be heard and, secondly, underlining the procedural side of Article 8 ECHR identified in child protection cases.

5.3 A procedural understanding of best interests

Article III, 'Understanding the Best Interests of the Child as a Procedural Obligation: the Example of the European Court of Human Rights', starts from where Article II ended. The article was motivated by the asymmetries in the child protection and immigration case law that I examined in Article II. How could the argumentation be improved? When reading the cases, I noticed an interesting pattern. Especially in newer cases in which the ECtHR found for the applicant, the Court increasingly based its argumentation on procedural shortcomings rather than on a substantive finding that the outcome of the case would not have been in the best interests of the child. I found this development remarkable and wanted to explore it further.

The terms 'procedural approach', 'procedural review' or 'process-based review' refer to a mode of reasoning in which a decision-making body focuses on how the decision being assessed was reached rather than the content of the decision. Such a development has been detected in both national and supranational courts.

388 *Strand Lobben and others v Norway*, App no 37283/13, 30 November 2017; cf *Strand Lobben* [GC], especially paras 149-152.

389 *Strand Lobben* [GC], para 135.

In Article III, I discussed this 'procedural turn' detected by many scholars[390] and suggested the procedural approach as a remedy to the inconsistent application of the best interests concept between different case groups. The article then presents a categorisation of three layers of a procedural approach to the best interests of the child in the ECtHR and illustrates the categories with examples.

As I explained in Article III, the ECtHR is a productive terrain for exploring the procedural approach as its case law demonstrates both the challenges of an outcome-focused approach to best interests and the procedural approach as a potential solution. When Article 3(1) CRC is understood as a predominantly procedural obligation, a consistent application of the best interests concept in different cases becomes easier. By an outcome-focused approach, I refer to an understanding by which decision-makers define which outcome is in the best interests of the child(ren) concerned. The challenges of an outcome-focused approach have been noted in other areas, too, in addition to migrant cases; in cross-border surrogacy, for example, where a violation of Article 8 ECHR was found based on best interests of the child due to the failure of national authorities to register the family, but no violation was found in otherwise identical circumstances when no genetic link existed between the parents and the child born as a result of a surrogacy arrangement.[391] Bracken has criticised the Court's approach for procedural inconsistency and for not expressing clearly how best interests were assessed and how the balancing was conducted.[392] However, in some areas, such as child abduction cases, a procedural approach seems to have been established after some struggles.[393] The ECtHR's increased emphasis on procedural arguments has been studied in earlier research focusing on the procedural turn of fundamental and human rights protection but not explored in depth in the context of best interests, even though a similar argument has been made concerning expulsion cases.[394]

In Article III, my categorisation of the ECtHR's procedural approach jurisprudence builds on a categorisation by Brems, who has identified three types

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390 Article III, 748-751; see eg Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017); Leonie Huijbers, *Process-based Fundamental Rights Review: Practice, Concept, and Theory* (Human Rights Research Series, Intersentia 2019); Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* 184.

391 *Mennesson v France*, App no 65192/11, 26 June 2014 and *Labassée v France*, App no 65941/11, 26 June 2014; cf. *Paradiso and Campanelli v Italy* [GC], App no 65941/11, 24 January 2017.

392 Bracken, 'Assessing the best interests of the child in cases of cross-border surrogacy: inconsistency in the Strasbourg approach?'

393 Vandenhole and Türkelli, 'The Best Interests of the Child' 213; Keller and Heri, 'Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights'.

394 Leloup, 'The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency'.

of 'substance-flavoured procedural review'.[395] I mapped ECtHR jurisprudence focusing on recent cases, with the aim of illustrating how the procedural approach may look in concrete cases and identified three layers according to the varying intensity of the review. In the first approach, the ECtHR acknowledges that a best interests consideration is required to satisfy the requirements of the substantive ECHR article in question. In the second, the ECtHR also pays attention to the quality of the consideration. In the third, the 'checklist approach', the ECtHR requires that national authorities have considered certain factors with sufficient attention. In Article III, I presented three forms of the checklist approach in more detail: that the national authorities have used last resort argumentation, linked best interests to relevant rights and considered the child's views. Other elements can also be relevant to the checklist approach, such as the use of expert evidence also emphasised by the ECtHR.[396] My categorisation of ECtHR case law shows that the ECtHR has created far-reaching procedural obligations for states in cases concerning the best interests of the child. At present, these procedural obligations are not equally developed in all case groups; in addition to Article 8 cases, they are used in some Article 5 cases when assessing the permissibility of the immigration detention of children.[397] However, as I argued in Article III, the ECtHR's principles of interpretation would allow the approach to be broadened to other ECHR articles.[398] This way, the procedural approach could contribute to aligning future case law and increasing the protection of children's rights.

As discussed above, the starting point of the article was the observation that the procedural approach has often proved more favourable to the applicant. Even though impartiality is one of the most important objectives in court cases, previous research has demonstrated that proceedings in human rights courts always manifest a bias towards either the applicant or the state in questions such as sharing the burden of proof. Favouring one party automatically disadvantages the other. As the ideal of perfect neutrality cannot be achieved in practice,

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395 Article III, 750-751; Eva Brems, 'The "Logics" of Procedural-Type Review by the European Court of Human Rights' in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) 34-35. It has been questioned whether a 'substance-flavoured procedural review' can be considered procedural: according to Lavrysen, assessing the quality of the decision-making process comprises a procedural review of the domestic authorities' compliance with a substantive obligation and should, therefore, be considered as a substantive positive obligation. Lavrysen notes, however, that as a general trend, the Court's preference for formulating its review in terms that fit the substance-flavoured procedural review scheme indicates 'a shift in the Court's mindset towards more deference to domestic authorities'. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* 109-110, 185.

396 See eg *Elita Magomadova v Russia*, App no 77546/14, 10 April 2018, paras 66-70 (child's residence); *V v Slovenia*, App no 26971/07, 1 December 2011, para 83 (child protection).

397 Article III, 756-765.

398 Article III, 759.

recognising and eliminating those biases that were not the result of conscious choice is crucial.[399] The procedural approach can be seen as a means to adjust the state bias of the ECtHR.

Article III focuses on the ECtHR and uses it as an example, but the article's claim is more general. I argued in Article III that the preference for the procedural approach results not only from the nature of the ECtHR system and the ECtHR's position as a supranational court with a subsidiary role in relation to national authorities – which surely make the procedural approach more feasible at the ECtHR compared to national courts[400] – but also from the nature of the best interests concept. In practice, understanding the concept as a procedural obligation means that in cases concerning children, courts would pay attention to whether the best interests of the child have been considered, the grounds of the assessment explained and procedural requirements, such as obtaining the child's views, followed. Recently, a similar view has been suggested by others.[401] The substantive assessment would be expressed in terms of the rights of the child.

To demonstrate that the added value of the best interests concept lies in understanding it as a procedural obligation, Article III considered the CRC Committee's understanding of Article 3(1) expressed in GC14 – that is, as a substantive right, an interpretive principle[402] and a rule of procedure – and argued that a threefold understanding does not sufficiently clarify the nature of best interests. The substantive dimension can be challenged because if considering best interests means considering relevant rights, the added value of the concept is questionable. The interpretive dimension seems to require a substantive best interests determination, and even though the interpretive dimension functions well when children's rights can be maximised, it does not seem helpful when rights conflict. However, as I also discussed in Article III, the substantive and interpretive functions should not be over-criticised: the substantive function underlines the rights of the child in line with the CRC's object and purpose, and the interpretive function adds value in situations in which the decision-making process has room to identify the best option for the child in question, for example, in adoption

399 Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* 8-9.

400 For a more detailed discussion of this and other challenges of a procedural approach at the ECtHR, see Article III, 765-766.

401 Eekelaar and Tobin, 'Article 3: The Best Interests of the Child' 84-95.

402 See also Geraldine Van Bueren, *The International Law on the Rights of the Child* (Kluwer Academic Publishers 1995) 45, who characterises the best interests of the child as 'a new principle of interpretation in international law'.

cases.[403] In previous research, the concept's function as an interpretive principle has been considered 'potentially powerful'.[404]

In Article III, I only discussed the interpretive function briefly. I discuss it further here as previous literature has not explored in detail the question of how the interpretive function should be understood. I suggest that an analytical distinction should be drawn between, on the one hand, interpreting other international obligations in light of the CRC in the meaning of Article 31(3)(c) VCLT and, on the other, using the best interests of the child as an interpretive principle when deciding between two interpretations of a provision of national law. Accordingly, the use of best interests in the ECtHR, for instance, does not depend on whether the best interests concept is understood as an interpretive principle but rather on general rules of treaty interpretation as well as the ECtHR's own interpretation techniques. In contrast, calling the best interests provision an interpretive principle that facilitates the choice between two interpretations of a legal provision comments on the use of international law in domestic courts. States have to abide by their treaty obligations in accordance with Article 26 VCLT, and provisions of internal law may not be invoked to justify failure to perform a treaty, as Article 27 VCLT provides. It is clear that an obligation to implement treaty obligations exists in international law, but is there also an obligation to interpret national legislation with treaty obligations? In other words, is the idea of best interests as an interpretive principle a new one, or do existing rules already require construing national law in light of Article 3(1) CRC?

As a general rule, international law does not prescribe its application on the domestic level. The effect of a rule of international law is a matter of national law.[405] According to a common understanding in several states, however, domestic law must be interpreted in conformity with international obligations.[406] According to this 'principle of consistent interpretation', domestic courts must interpret

403 Article III, 752-754.

404 Vandenhole, 'Distinctive characteristics of children's human rights law' 26.

405 Gerrit Betlem and André Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation' (2003) 14 European Journal of International Law 569, 573; Armin von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' (2008) 6 International Journal of Constitutional Law 397, 403.

406 In the United States context, this principle originates from the Supreme Court case *Murray v The Schooner Charming Betsy*, 6 U.S. 64 (1804) and is accordingly called the 'Charming Betsy principle'; according to the rule expressed in the case, 'An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains'. For a discussion of the principle in the United States context, see Ralph G Steinhardt, 'The Role of International Law as a Canon of Domestic Statutory Construction' (1990) 43 Vanderbilt Law Review 1103. Examples can also be found from other jurisdictions: in the *Teoh* judgment, for instance, the High Court of Australia held that 'a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law'; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

domestic law consistently with international law[407] – a position that has been called 'internationalist'[408] and is not accepted by all scholars.[409]

The principle of consistent interpretation is primarily a matter of national law. As Nollkaemper observes, there is no obligation deriving from international law for national courts to engage in consistent interpretation as national courts are an organ of the state and their powers are not directly determined by international law.[410] Nevertheless, the principle of consistent interpretation can be grounded in international law, too; it has been argued that there is 'sufficient acceptance of the notion of international law as "higher law" that must be given effect in the national legal order, and that courts, and state organs, are responsible for the proper application of international law within their jurisdiction'.[411] Nollkaemper has argued that from the perspective of international law, widespread state practice combined with the principle of effective treaty interpretation can be used as a basis for construing the principle of consistent interpretation. Another basis is the hierarchically higher status of international law in relation to national law.[412] The CESCR has also referred to the 'generally accepted' idea that

> [D]omestic law should be interpreted as far as possible in a way which conforms to a state's international legal obligations. Thus, when a domestic decision-maker is faced with a choice between an interpretation of domestic law that would place that state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter.[413]

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407 Betlem and Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation' 571-572; von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' 401-402; d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' 143-144; André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011) 139-165.

408 Katharine G Young, 'The World, through the Judge's Eye' (2009) 28 The Australian Year Book of International Law 27, 42-46.

409 See eg Curtis A Bradley, 'The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law' (1997) 86 Georgetown Law Journal 479, 535-536.

410 Nollkaemper, *National Courts and the International Rule of Law* 148; von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' 402.

411 Betlem and Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation' 574.

412 Nollkaemper, *National Courts and the International Rule of Law* 149.

413 Committee on Economic, Social and Cultural Rights, 'General Comment No 9: The domestic application of the Covenant' E/C.12/1998/24 (3 December 1998), para 15.

This quote resembles the CRC Committee's statement regarding the best interests concept as an interpretive principle. As well as being a general obligation, the principle of consistent interpretation exists in several states in state practice[414] and national law[415]. It can, therefore, be questioned whether the interpretive dimension of the best interests concept is of added value.

To summarise, I suggested in Article III that Article 3(1) CRC should be understood as a predominantly procedural obligation. Such an interpretation is reasonable: it better safeguards children's rights than a substantive approach, and it allows for a consistent application of the concept between case groups. It adds value to the existing legal framework by obliging decision-makers to consider the best interests of the child, and it is also logical in light of rules of international law on treaty interpretation. I illustrated the argument with a typology of three layers of the procedural approach to the best interests of the child in the ECtHR. Article IV continued to examine the procedural-structural trend in the context of the best interests of the child.

5.4 Best interests in the CRC system: the CRC Committee's emphasis on domestic structures

Because the concept of the best interests of the child as a standard of human rights law derives from the CRC, it seemed necessary to explore the interpretation of the concept in the CRC system in depth. As the CRC Committee is the treaty body assigned to monitor states parties' progress in implementing the convention, its conceptualisation of the best interests concept forms a starting point for how the concept is interpreted in the CRC system. Article IV, 'A Focus on Domestic Structures: Best Interests of the Child in the Concluding Observations of the UN Committee on the Rights of the Child', addresses this question by analysing the Committee's COs.

The CRC Committee has several ways of monitoring the implementation of the CRC and contributing to its interpretation. The Committee issues general comments, examines state reports and issues COs based on them, as well as considers individual complaints regarding alleged CRC violations.[416] Of these three tasks, examining state reports and issuing COs, which are the focus of Article IV, consume the majority of the Committee's time and resources. The

414 Betlem and Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation' 574-575.

415 Nollkaemper, *National Courts and the International Rule of Law* 147.

416 In addition, the Committee conducts other activities, such as Days of General Discussion. For a more detailed description of the reporting process, see Article IV, 102-103.

reporting procedure is the original monitoring activity: starting from 1993, states are expected to submit their initial reports to the Committee and, thereafter, a report every five years.[417] A vast body of COs are now available. The Committee's views have a soft law status, but it is a commonly accepted view that by ratifying a convention, states accept that the interpretation of the convention changes over time. Treaty bodies play a key role in this development as authoritative interpreters of their respective treaties. Despite their formal non-binding status, therefore, the Committee's views are important in interpreting the CRC, and states parties are expected to follow them.[418]

The CRC's reporting mechanisms face challenges. The reporting process may suffer from various biases: countries with a comparable human rights performance can receive differential treatment; the review may be biased towards certain issues for political reasons; and cultural differences may be instrumentally employed in the review process.[419] West-centrism, for example, may affect the Committee's vision.[420] The number of reports per Committee session has increased, meaning that the Committee has less time to allocate to each report than before.[421] The reporting procedure also suffers from non-reporting, late reporting and a backlog of reports pending before the CRC Committee, and the large amount of human rights treaties results in almost constant report drafting.[422] The effectiveness of recommendations depends on how they are translated to practice at the domestic level. Earlier research has shown that the follow-up of COs varies and domestic courts selectively engage with the findings of human rights treaty bodies.[423] Previous quantitative accounts indicate low judicial engagement with the CRC

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417 General Comments began in 2001, individual complaints in 2014.

418 For a discussion on the legal status of the COs, see International Law Association, Committee on International Human Rights Law and Practice, 'Final Report on the impact of findings of the United Nations human rights treaty bodies' (Berlin 16-21 August 2004), paras 15-27; Jasper Krommendijk, *The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland: Paper-pushing or policy prompting?* (Intersentia Antwerp 2014) 7-9. See also Article IV, 103.

419 Valentina Carraro, 'The United Nations Treaty Bodies and Universal Periodic Review: Advancing Human Rights by Preventing Politicization?' (2017) 39 Human Rights Quarterly 943.

420 The Committee has sometimes expressed concern that 'the persistence of certain local customs and traditions' or 'customary law' impedes the implementation of Article 3, without specifying what those traditions are. See eg Committee on the Rights of the Child, 'Concluding observations: Botswana' CRC/C/15/Add.242 (3 November 2004), para 31; Committee on the Rights of the Child, 'Concluding observations: Yemen' CRC/C/15/Add.267 (21 September 2005), para 35.

421 However, time and resource constraints have been present from early on; see Cohen, 'The Developing Jurisprudence of the Rights of the Child' 28-29.

422 Jaap E Doek, 'The CRC: Dynamics and directions of monitoring its implementation' in Antonella Intervenizzi and Jane Williams (eds), *The Human Rights of Children From Visions to Implementation* (Ashgate 2011) 107.

423 See ibid 103-104; Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies before Domestic Courts' (2018) 67 International and Comparative Law Quarterly 201-232; Jasper Krommendijk, 'Finnish Exceptionalism at Play? The Effectiveness of the Recommendations of UN Human Rights Treaty Bodies in Finland' (2014) 32 Nordic Journal of Human Rights 18, 27.

Committee's output, including with COs.[424] One study, however, found the CRC Committee's recommendations to be more effective compared to those of the other five treaty bodies analysed.[425] Furthermore, it has been demonstrated that domestic respect of human rights in general is improved when an active domestic civil society contributes to the reporting process.[426]

Article IV makes an original contribution to the field as the largest published review of COs. To examine the Committee's understanding of best interests, I could also have analysed GC14 and other general comments. I decided to focus on COs because they are the Committee's main monitoring activity, and I assumed they might offer a more concrete and deeper view of best interests than the general comments, which contain interpretations that are both well-known and, as I have claimed earlier, have not sufficiently clarified the nature of the concept.[427] I presupposed that because of the function of COs to guide states and comment on real-life issues, they would paint a picture both comprehensive and more detailed than the general comments (although, as I discuss later, these expectations were only partly correct). A systematic analysis also seemed necessary to draw out the Committee's views in the COs, which are somewhat hidden in the massive amount of details and polite political-legal dialogue between the Committee and the states. As I noted in Article IV, a lack of research analysing COs has caused a significant part of the Committee's interpretation of the concept to be overlooked.[428] Of course, the Committee's views expressed in the COs have to be considered with those in the general comments and views concerning individual communications. The analysis of general comments in section 2.3 of this summary is a step in this direction. Especially in newer COs, the Committee often refers to its own general comments when giving specific recommendations, which contributes to increased alignment of jurisprudence.

Studying the COs revealed two interrelated findings. The first is that the Committee discusses the best interests of the child in various recurring contexts.

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424 Couzens, 'CRC Dialogues: Does the Committee on the Rights of the Child "Speak" to the National Courts?' 105-106.

425 The study examined the effectiveness of COs in the Netherlands, New Zealand and Finland. See Krommendijk, *The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland: Paper-pushing or policy prompting?* 213-363.

426 Gráinne de Búrca, 'Human Rights Experimentalism' (2017) 111 American Journal of International Law 277, 298-309.

427 Previous commentators have argued with reference to general comments that the Committee has not defined the best interests of the child. See Vandenhole, 'Distinctive characteristics of children's human rights law' 26; Ivana Isailovic, 'Children's rights and LGBTI persons' rights: Some thoughts on their "integration"' in Eva Brems, Ellen Desmet and Wouter Vandenhole (eds), *Children's Rights Law in the Global Human Rights Landscape* (Routledge 2017) 199. See also Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' 64.

428 Article IV, 101.

Whereas in the drafting phase of the CRC best interests were often mentioned as an exception to the rule – states should do X, unless it is not in the child's best interests – in the COs, most of the recommendations treat best interests as a main rule.[429] The Committee has connected best interests to other CRC general principles, to children in vulnerable situations, such as migrant children or children of imprisoned parents, and to alternative care and adoption issues, as well as to some civil and political rights and ESC rights.[430] Family unity seems to be considered a central component of best interests. The article shows that the Committee offers no comprehensive definition of best interests in the COs. Despite the variety of contexts, the concept is rarely defined except for providing examples of what best interests are not.[431] At times, the Committee gives clues about the nature of the obligation expressed by Article 3(1) CRC, for example, by characterising best interests as a positive obligation and directly applicable.[432] Other recurring interpretations are a strong connection between best interests and human rights and the need to take into account a variety of factors when assessing best interests. However, while the Committee often emphasises the importance of Article 3(1), for example, by underlining the indivisible and interdependent nature of the CRC as well as the relevance of best interests in interpreting the CRC, the COs provide little guidance for defining the best interests concept.

As I claimed in Article IV, the finding that best interests are discussed in various contexts is interesting for several reasons, but it is not particularly useful when trying to grasp the Committee's understanding of the concept. The selection of recurring themes depends on several factors, such as the content of state reports, and does not necessarily reflect the Committee's overall views on the contexts in

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429 See, however, eg Committee on the Rights of the Child, 'Concluding observations on the second periodic report of Gabon' CRC/C/GAB/CO/2 (8 July 2016), para 65, where the Committee recommends supporting family reunification unless it is not in the best interests of the child; Committee on the Rights of the Child, 'Concluding observations on the combined fourth and fifth periodic reports of Chile' CRC/C/CHL/CO/4-5 (30 October 2015), para 55(d) and Committee on the Rights of the Child, 'Concluding observations: Dominican Republic' CRC/C/DOM/CO/2 (11 February 2008), para 53(e), where contact with parents while the child is in care is expressed as the main rule, unless not in the child's best interests; and Committee on the Rights of the Child, 'Concluding observations: United Kingdom of Great Britain and Northern Ireland' CRC/C/GBR/CO/4 (20 October 2008), para 45(d), where contact with the imprisoned parent is mentioned as the main rule, unless it is not in the child's best interests. Freeman has previously noted the Committee's tendency to define the concept by negation, see Freeman, 'Article 3: The Best Interests of the Child' 51-60.

430 For the contexts in more detail, see Article IV, 104-109, including table 1 displaying the concerns and recommendations for each context.

431 Similarly, see Freeman, 'Article 3: The Best Interests of the Child' 51-60.

432 In practice, national courts do not always consider Article 3(1) as directly applicable; however, see eg Wouter Vandenhole, 'Belgium' in Ton Liefaard and Jaap Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2015) 110-112, who notes that parties and judges often invoke concept as a general principle of law, which does not require them to accept the direct effect of Article 3(1) CRC.

which best interests should (or should not) be considered.[433] The COs mirror the Committee's efforts to highlight areas that it considers particularly problematic regarding the implementation of the CRC in a particular state. To enhance the effectiveness of the COs, concentrating on a limited number of critical issues seems to be a good strategy.[434]

Secondly, and most interestingly, Article IV found that the COs display a structural view of the best interests of the child; instead of defining the concept, the Committee focuses on describing what kind of active measures states must take to implement Article 3(1). In Article IV, I identified six cross-cutting themes that outline such measures and used these themes as a framework to analyse the COs. Best interests should (1) be integrated into national legislation together with criteria for assessing them and also (2) incorporated in policies, procedures and decisions; the concept is effective only if implemented in practice. Furthermore, the Committee has emphasised (3) cooperation, both national and international, as well as (4) awareness-raising and training of professionals.[435] The Committee has also recognised the (5) interdependent relationship of resources and best interests. Finally, (6) monitoring and impact assessments are essential to fulfilling the requirements of Article 3(1).

While composing a definition of best interests applicable in all circumstances would be impossible, which partly explains the lack of a definition, the focus in the COs on structures and not content remains interesting. The Committee's focus on active measures can be interpreted as reflecting its understanding of best interests as a positive obligation, which sheds light on why the best interests concept does not function well in situations where best interests are limited or balanced with another interest or right.

The cross-cutting themes I identified are almost identical to the general measures of implementation (GMIs) previously introduced by the Committee.[436] In this respect, the Committee has been consistent regarding what it expects from states. As I argued in Article IV, this similarity implies that the Committee views other CRC obligations as requiring similar active measures because the GMIs are relevant for the implementation of the whole CRC. The Committee often connects Article 4 CRC, the principal article reflecting the GMIs, to best interests

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433 See eg Article IV, 104 and 117.

434 Krommendijk, *The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland: Paper-pushing or policy prompting?* 391-392.

435 Based on a review of the CRC Committee's general comments, Williams has argued that while professionals play a crucial role in effectively implementing the CRC, more attention should be given to issues related to translating the CRC into professional practice, see Williams, 'The Role of Professions in Effective Implementation of the CRC'.

436 Implementation measures described in GC14 also reflect the GMIs to an extent; see GC14, paras 15(a)-(h).

in the context of budget allocations. When considering how to categorise the cross-cutting themes, I did not have the GMIs in mind; rather, the focus on the structural level was obvious, and the categories were clearly distinguishable. When I noticed the resemblance between the categories and GMIs, I decided not to mould them into the format of the GMIs but to present them as a distinct categorisation.

6 MAJOR IMPLICATIONS OF THE FINDINGS

6.1 Radical and reconstructive solutions

In this section, I discuss the findings of the articles from various angles to underscore central implications of the study and suggest the broader relevance of the findings. The thesis has both specific implications for the concept of the best interests of the child and more general implications. As I already discussed the methodological contributions in section 4, including the importance of systematic case selection in studying human rights practice and a new conceptualisation of comparison as a method, I concentrate here on other common threads between the articles. Finally, I discuss the limitations of the study.

While this thesis has mainly posed 'how' questions so far, 'why' questions matter, too. Therefore, the discussion of the findings is structured around a central problem that the articles brought forward: why are best interests not a primary consideration in human rights practice in the way intended in Article 3(1) CRC, and what could be done about it? The thesis offers several answers to this question. I begin by reflecting on what the findings reveal about the interaction between systems for the protection of human rights. Next, I suggest potential reasons why best interests are not adequately implemented in human rights practice, which include the following: the tension between the maximalist nature of the best interests concept and the unclarity regarding the criteria under which it can be limited; the dichotomy between positive and negative obligations; and excessive reliance on the idea that case-by-case assessment will produce the best solutions. I also introduce possible solutions to remedy these problems, such as using the terminology of limiting rights instead of balancing as well as moving from a substantive to procedural approach in human rights practice. I further discuss the conceptualisation of best interests as a procedural obligation and connect this idea to the CRC Committee's emphasis on domestic structures in implementing the best interests of the child.

Naturally, the themes discussed here are not an exhaustive list of the reasons why the best interests of the child are not sufficiently considered in human rights practice, nor are the solutions exhaustive. Lavrysen talks about 'radical' and 'reconstructive' solutions in the context of researching ECtHR jurisprudence. In this dichotomy, a 'radical' approach seeks for the 'morally best' solution but is insensitive to practice, whereas a 'reconstructive' approach means 'favouring normative solutions that "fit" the Court's current practice and that are therefore more likely to be integrated in the Court's legal methodology'. The need for reconstructive solutions arises from practice: while some possible remedies to the

problems identified would change the current practice completely, such suggestions may be too radical and, thus, unhelpful.[437] Similarly, Lynch and Liefaard have argued that it is vital to move 'beyond critique into co-design': while presenting criticism for noncompliance with children's rights standards is important, it is 'more difficult to work in balancing the various rights and interests inherent in law reform and policy formation'.[438] Some problems identified in this thesis call for radical solutions, such as transforming the ECtHR's methodology in migrant cases by departing from the 'Strasbourg reversal' and aligning the assessment of best interests with child protection jurisprudence. In practice, however, identifying solutions that are more likely to be adopted may be more valuable in practice; it is not likely, for example, that the ECtHR will completely abandon its current approach in immigration cases. In many situations, exposing a problem is valuable in itself. While shaping policies is beyond the scope of this thesis, it remains important to find ways to make the best interests concept work effectively in the current system.

6.2 Interaction between systems

A strand between the articles is the interaction between different systems for the protection of human rights. This theme is also one of the central premises of the thesis described in section 3.3, following previous research that has established how systems on different levels interact with each other, both vertically and horizontally. However, interaction between the UN, CoE and national systems is sporadic at times, and it would be impossible to claim that there is a unified understanding of best interests.

The thesis revealed variation in the level of human rights protection between different contexts. Article I found differences between case groups regarding whether the SAC pays attention to best interests, and how much, and Article II showed that in the ECtHR, best interests are connected to different factors in different case groups. These findings are not surprising in light of previous research, as I discussed earlier. It is, of course, important to remember that despite the problems associated with the concept in human rights practice, the fact that

437 Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* 30-31, 311-312. The categories 'radical' and 'reconstructive' are an adaptation of Möller's distinction between 'philosophical' and 'reconstructive' theories of constitutional rights, see Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012) 20.

438 Nessa Lynch and Ton Liefaard, 'What is Left in the "Too Hard Basket"? Developments and Challenges for the Rights of Children in Conflict with the Law' (2020) 28 The International Journal of Children's Rights 89, 103, in the context of research concerning children in conflict with the law.

the ECtHR, for example, uses CRC provisions to inform the interpretation of the ECHR has strengthened the protection of children's rights.[439] The extent to which children's rights are subordinated to the interests of immigration control is, however, striking, as it results in unjustified differences in how children are able to enjoy their rights. As Collinson has stated, 'recognising the differences in context in which the best interests of the child need to be assessed is not the same as saying that the best interests of the child, as a human rights standard, might vary depending on political context.' Consequently, 'it cannot be legitimate to say that the best interests of the child should be a lesser standard where it might interfere with politically sensitive activities'.[440]

The articles shed light on various aspects of interaction between systems. Articles I and IV discussed the interaction between the international and national. Article I demonstrated the difficulties faced when implementing international human rights provisions at the national level. On the one hand, it showed the sporadic nature of interaction between national and international levels: factors such as whether a reference to the best interests concept and/or to international law has been made in the preparatory works of a domestic act have a bearing on whether the concept is considered relevant. On the other hand, it illustrated the multiple ways in which domestic courts apply international human rights law. Human rights obligations are frequently given space in some case groups but not considered at all in others. This is problematic from the perspective of compliance with international human rights norms as it may signal that the CRC has not substantially influenced the argumentation in national courts. Furthermore, Article 3(1) CRC was rarely the decisive argument in the materials studied. Article IV illustrated that the national affects the international. As the CRC Committee's COs demonstrate, the CRC Committee tries to formulate persuasive arguments to convince states of the importance of implementing the CRC. A central finding of Article IV, concerning the Committee's focus on domestic structures in implementing Article 3(1) CRC, demonstrates the importance of the national level in realising human rights.

Articles II and III illustrate the interaction between the international and regional. Article II confirms the finding of earlier research that regional systems not only use concepts of international human rights law but also infuse them with their meanings and fill them with more specific content. The regular use of the best interests concept in ECtHR cases concerning children implies an increased

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439 Eg Ursula Kilkelly, 'The CRC in Litigation under the ECHR' in Ton Liefaard and Jaap Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2015) 194.

440 Jonathan Collinson, 'Reconstructing the European Court of Human Rights' Article 8 Jurisprudence in Deportation Cases: The Family's Right and the Public Interest' (2020) 20 Human Rights Law Review 333, 358-359.

alignment of the ECHR and CRC systems. It is important to note, however, that the genuineness of the alignment is debatable as, in many respects, the ECtHR's use of the best interests concept falls short of the requirements of the CRC system. Especially in immigration cases, the ECtHR engages selectively with factors that the CRC Committee considers relevant in a best interests assessment,[441] such as the right to be heard and certain ESC rights.[442] The ECtHR's current practice of referring to best interests in the context of Article 8 only risks reducing the jurisprudential development of elements other than those that fall in the scope of private and family life.[443] However, it is clear that the application-driven nature of the ECHR system complicates a consistent application of any human rights norm and makes a direct comparison with the CRC system unfair. The ECtHR is forced to balance various rights and interests in individual cases and deliver an outcome while finding an equilibrium between respecting the human rights of the applicants and maintaining its legitimacy. This is illustrated by the fact that ECtHR judges may agree on the general principles of a case and disagree on their application to the facts of the case.[444] Article II showed that while the Court's approach in child protection cases tends to follow closely the CRC standards, such as Article 9 on family unity[445] and, increasingly often, Article 12 on participation, immigration case law leaves much to be desired in this regard. However, though it underscores some divergences and convergences between the CRC and the ECHR systems, Article II uncovers more about the difficulties of applying the best interests concept in practice and about the difficulties of balancing best interests with the interests of society.

Article III continued the same line of thought and illustrated the interaction between the CRC and the ECHR systems. The more specific categories of the procedural approach currently used by the ECtHR, the checklist approach and the quality-focused approach, open the door for the CRC to inform the interpretation of the ECHR. This is because several elements the ECtHR has expected national authorities to consider are in line with the CRC. The ECtHR has often linked best interests to CRC rights.[446] Focusing on the views of the child can similarly align

441 Similarly, see ibid 350 with regard to the ECtHR's deportation jurisprudence.

442 Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?' 90-93.

443 Similarly, see Jonathan Collinson, 'Making the best interests of the child a substantive human right at the centre of national level expulsion decisions' (2020) 38 Netherlands Quarterly of Human Rights 169, 171.

444 This was the case, for example, in the Grand Chamber child abduction case *X v Latvia* [GC], App no 27853/09, 26 November 2013; see Torunn E Kvisberg, 'Child Abduction Cases in the European Court Of Human Rights – Changing Views on the Child's Best Interests' (2019) 6 Oslo Law Review 90, 106.

445 Regarding the emphasis the Court places on family unity, see eg *Strand Lobben* [GC], para 207, where the ECtHR acknowledges that an 'important international consensus' exists about the rule expressed by Article 9(1) CRC.

446 Article III, 759-765.

the CRC and ECHR. In addition to the interaction between the regional and the international, Article III illustrated the supervisory role of the ECtHR in relation to national authorities when it relies on the quality-focused procedural approach and assesses whether national decision-making procedures have fulfilled certain criteria.

What do interaction and integration between systems and sources of human rights law mean for the best interests concept? Does integration lead to better jurisprudence from the perspective of children's rights? This thesis gives a twofold answer to that question: integration has potential as it has resulted in better results in many cases, but the improvement is not inevitable. While a reference to Article 3(1) CRC can be used to support reasoning that furthers children's rights, criticism that the concept serves as a rhetorical device[447] is not unfounded in light of the findings of this thesis. Article II showed that even in cases where best interests are considered, the outcomes might not be in line with children's rights, which is demonstrated by the unjustified differences between child protection and immigration cases. In some cases, best interests have been mentioned but not genuinely considered. Article II showed that the ECtHR often refers to the 'paramount' nature of the best interests concept but that this paramountcy often disappears when applied to the concrete facts of the case. As I argued in Article II, there is often 'a mismatch between the obliging vocabulary and the weight accorded to best interests'.[448] Article III showed that when reviewing whether domestic authorities complied with the ECHR, the ECtHR pays attention to the quality of a best interests consideration, which is illustrated with the quality-focused and checklist approaches. Finally, Article IV demonstrated that the CRC Committee believes in human rights integration, which is visible, for example, when the Committee recommends ratifying other treaties.

6.3 A maximalist concept without limitation criteria

In this section, I explore a possible explanation for the problems related to the application of the best interests concept in human rights practice: a minimalist understanding of human rights and the problems of an approach focused on

447 Eg Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* 392.

448 Article II, 253.

limiting rights.[449] I argue that the best interests concept aims to maximise human rights and that combined with the unclarity about the criteria under which the best interests of the child can be limited, the maximalist nature of the concept makes it unfit for a context focused on limiting rights, such as decision-making in courts. The tension between the concept's maximalist nature and the minimalist environment contributes to the concept being sidelined in the argumentation of courts.

Brems has criticised the common 'border control type' approach to human rights monitoring, which focuses on the concept of human rights violations. According to this minimalist logic, a violation takes place if an action or omission crosses the borderline, but the variety of approaches beyond the borderline receives little attention and does not encourage ambitious human rights agendas. This focus on the border often means that degrees of violations – or degrees of respecting, protecting and fulfilling human rights – are not recognised. Such a situation encourages states to avoid violations instead of looking for best practices. Another problem is the border's 'bottom line' character; the location of the border is often not clear, and a finding of non-violation by supranational bodies, such as the ECtHR, often results, in practice, to the borderline becoming the bottom line.[450] This is visible, for example, in the ECtHR's immigration jurisprudence, where findings of non-violation are often cited in newer case law, whereas verdicts of violation are regarded as exceptional. In contrast to the minimalist logic, a 'maximalist' discourse 'presupposes a society, or government, or regime, perceiving the protection of human rights as part of their common heritage or identity of their shared goals'. In the maximalist discourse, 'states actively search for the policy option that least restricts human rights or that contributes most to effective human rights protection and fulfilment'. In practice, states would prioritise the most human rights friendly policy options and conduct human rights impact assessments. Ideally, reporting procedures would be an effective tool with which to measure human rights progress.[451]

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449 The terms minimalist and maximalist can also be used in another meaning, that is, to refer to the relationship between different systems for the protection of human rights. In this meaning, a minimum standard signifies that human rights treaties constitute a minimum level of human rights protection and that national interpretations should aim at better protection. A minimum standard set by a human rights treaty is, therefore, relevant in the context of limiting rights. In Finland, for instance, one of the criteria for limiting fundamental rights enshrined in the Constitution is compliance of the limitation with human rights treaties binding upon Finland. Nevertheless, this is not the only criterion, which means that the permissibility of a limitation in the ECHR system does not automatically result in the permissibility in the national test. For the Finnish criteria, see Constitutional Law Committee 25/1994, 4–5; Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations' 146-147.

450 Eva Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9 Human Rights Law Review 349.

451 Ibid 371-372.

As a potential solution to addressing the minimalist logic, Brems proposes extending the concept of progressive realisation to the area of civil-political rights so that in addition to a bottom line of state obligations, there would also be a 'horizon line' signalling good practices. Extending the idea of progressive realisation would also contribute to stripping down the artificial division between the dichotomy between civil-political rights, associated with negative obligations, and ESC rights, associated with positive obligations.[452] I address this dichotomy in the next section. Another solution would be the least restrictive alternative criterion, which would necessitate either choosing the option that least restricts human rights or requiring evidence that less restrictive means have been considered; with this solution, a maximisation criterion could be included in the process of a court determining the location of the violations border. A consistent application of the least restrictive alternative criterion, however, appears difficult.[453] Despite these suggestions, the tension between the maximalist best interests concept and the minimalist logic of courts is unlikely to disappear.

Simplified, the tension between minimalist and maximalist approaches can be illustrated by court judgments that contrast with the position of the CRC Committee. The different position of the child in the ECHR system and the SAC as opposed to the CRC Committee have an impact on the role that the child's rights and interests can have in the reasoning. The lens through which the facts of the case are viewed affects the balancing of interests.[454] As explained above, the starting point of argumentation in courts is usually whether rights have been violated. The tendency of courts to settle for the minimum standard has been noted, for example, in the Finnish context.[455] The ECtHR has to find a balance between different rights and interests, which is complicated by the adult-centric structure of the ECHR in which children's rights, including the best interests of the child, often appear as exceptions to the rights of adults and the premise is protecting a parent's rather than the child's rights.[456] The problems are exacerbated by issues related to children's representation in courts. Representation demonstrates the effect of framing the issue on best interests assessments; who is entitled to represent a child's interests can prove to be significant in how those interests are understood by courts.[457] As Liefaard has noted, assessing the child's best interests does not

452 Ibid 365-366.

453 Ibid 359-365.

454 Collinson, 'Reconstructing the European Court of Human Rights' Article 8 Jurisprudence in Deportation Cases: The Family's Right and the Public Interest' 338-339.

455 Lavapuro, Ojanen and Scheinin, 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review' 523.

456 Fenton-Glynn, 'Children, parents and the European Court of Human Rights' 647; Jane Fortin, 'Children's Rights: Are the Courts Now Taking Them More Seriously?' (2004) 15 King's College Law Journal 253, 268.

457 Fenton-Glynn, 'Children, parents and the European Court of Human Rights' 649-652.

equate to legal representation, and legal representation is needed to ensure that the child has an opportunity to express his or her views also on which procedural steps are taken.[458]

In contrast to courts, the COs often manifest a 'maximalist' approach to human rights monitoring; instead of focusing on whether a violation took place, the Committee guides states in shaping legislation and policies to optimally ensure children's rights. Having analysed the CRC Committee's general comments in terms of their usefulness for national courts, Couzens has concluded that the division between lawful and unlawful is not clear; general comments 'often tell us what advances the rights and well-being of children but not what the state is legally bound to do'.[459] The Committee's reluctance to spell out clearly the state's legal obligation may result in part from an unwillingness to reduce the CRC to a minimum level. Khaliq and Churchill have noted that the CRC Committee considers all CRC rights justiciable, even the vaguer ones, but does not explain why.[460] Such an approach is possible because the CRC Committee does not have to consider conflicting interests, except when handling individual communications. In its emerging jurisprudence concerning individual communications, too, the Committee's position is child-centred.

Based on the findings of this study, the concept of the best interests of the child does not fit in a minimalist framework. The concept does not seem to work well in a setting where rights are limited. I suggest that a partial explanation for this is the combination of the maximalist nature of the best interests concept and the unclarity concerning the criteria under which the best interests of the child can be limited. The maximalist nature of the concept is reflected in the wording of Article 3(1) CRC: the concept aims to enable the best possible solution for the child, and the CRC Committee's guidelines for balancing start from the idea that children's interests have to be prioritised.[461] What, then, is an acceptable minimum level for Article 3(1)? This is an important question because the ideal of prioritising children's interests is rarely reached in human rights practice, as demonstrated in this thesis and elsewhere. I suggest that if Article 3(1) is used as a yardstick to

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458 Liefaard, 'Access to Justice for Children: Towards a Specific Research and Implementation Agenda' 207. On the complex nature of legal assistance and challenges related to it, see ibid 207-213.

459 Couzens, 'CRC Dialogues: Does the Committee on the Rights of the Child "Speak" to the National Courts?' 118.

460 Urfan Khaliq and Robin Churchill, 'The protection of economic and social rights: a particular challenge?' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 222.

461 Some have proposed that the idea of determining what is best for a child could be 'supplanted by the opposite notion of the "least pain," or the principle of precaution' in situations where children's interests conflict with other interests. See Jean Zermatten, 'Best Interests of the Child' in Said Mahmoudi and others (eds), *Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill Nijhoff 2015) 39.

measure the outcome of a decision, the legal content of Article 3(1) in the case at hand should be defined, after which the criteria for limiting human rights (instead of balancing) should be applied.[462] I outline the difference between balancing and using limitation criteria in section 6.4.

As discussed above, the difficulty of providing efficient human rights protection while looking for the violations borderline is not limited to the best interests of the child only; decision-making in courts is, in general, of such nature that promoting human rights is often left out of the agenda. Nevertheless, the best interests concept seems to be particularly ill-fitted to such a context because it invites picturing the best circumstances for the child concerned without guidance on how to assess a situation in which other interests or rights possibly weigh more than those of the child. Claims about something being in a child's best interests will rarely hold if a child does not have a right to something that is in his or her best interests. As Crock has noted, the problem is that the 'over-arching principle does not create an absolute right'.[463]

In light of this study, a minimalist approach is particularly striking in the context of migration law. The finding that children's best interests are often set aside in migration cases can be explained by the strong state-centric tradition in the ECHR system[464] and in migration law in general, where ideas such as security, state sovereignty and privileging citizens over non-citizens play a prominent role.[465] The tension between human rights and sovereign self-determination claims[466] underlies the argumentation of actors interpreting human rights law, including the SAC and the ECtHR. As a supranational court, the ECtHR needs to find a balance between subsidiarity and advancing human rights. In other case groups, too, considerations related to legitimacy and the role of courts set limits on maximalist interpretations. In migration law, however, such considerations appear particularly strong. Previous research has demonstrated that the internal structure of migration law limits the scope of case-by-case best interests assessments. Consequently, there may be an inherent conflict between

462 Collinson, who argues that the best interests of the child can be understood as a substantive human right in national expulsion decisions, has composed a broadly similar list of limitation criteria, although he does not explicitly comment on the difference between balancing and limiting rights nor on how best interests should be determined. See Collinson, 'Making the best interests of the child a substantive human right at the centre of national level expulsion decisions' 177-178.

463 Mary E Crock, 'Justice for the Migrant Child: The Protective Force of the Convention on the Rights of the Child', *Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Stockholm Studies in Child Law and Children's Rights, Brill Nijhoff 2015) 225.

464 Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*.

465 See eg Elspeth Guild, *Security and Migration in the 21st Century* (Polity 2009).

466 Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004).

immigration law and the rights of the child.[467] A similar argument has been made in relation to ECtHR deportation case law concerning foreign national offenders with children, although on somewhat different grounds; the argument is that the ECtHR's decision-making structure is built in such a way that it does not allow the Court to assess the best interests of the child as a separate criterion nor to genuinely consider all relevant rights.[468] The ECtHR's stance on nationality in cases concerning the deportation of long-time foreign residents has been criticised for operating 'within a racially discriminatory paradigm' and for strengthening the logic of state sovereignty by not examining the conditions of access to nationality nor recognising the constructed nature of nationality law, among other reasons. In retrospect, regarding discrimination based on nationality as legitimate may one day appear as incomprehensible as gender inequality.[469]

However, migration law is not the only context dominated by the minimalist logic, as discussed above; in general, decision-making in courts is prone to looking for the borderline. As the maximalist formulation of the best interests concept and the unclarity regarding the criteria for limiting best interests complicate its application in a minimalist setting, it is all the more important in the context of migration law, too, to understand whether the best interests of the child can be limited or not.

6.4 The imagined dichotomy between positive and negative obligations and the problems of 'balancing' best interests

The dichotomy of positive and negative obligations, which is closely associated with the dynamics of minimalist and maximalist approaches to human rights protection, is a useful lens through which to understand the problems of balancing as opposed to the criteria for limiting rights. I suggested in Article IV that the CRC Committee's focus on active measures in implementing Article 3(1) CRC can be interpreted to convey the Committee's understanding of Article 3(1) as a positive obligation. Even though the Committee also recommends that states refrain from harmful measures in the COs, the recommended measures are mostly of an active nature. The focus on active measures can partly be explained by the role of COs as guiding states' future action, but the COs also shed light

467 Mustasaari, 'Best interests of the child in family reunification – a citizenship test disguised?' 130-131, 142; see also Jacqueline Bhabha, 'Governing adolescent mobility: The elusive role of children's rights principles in contemporary migration practice' (2019) 26 Childhood 369.

468 Collinson, 'Reconstructing the European Court of Human Rights' Article 8 Jurisprudence in Deportation Cases: The Family's Right and the Public Interest'.

469 Marie-Bénédicte Dembour, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg' (2003) 21 Netherlands Quarterly of Human Rights 63.

on the Committee's understanding of best interests. State obligations regarding human rights are commonly divided into negative and positive obligations. The consequences of this dichotomy are visible in the assessment of whether rights can be limited: in the ECtHR, while a more detailed test is used for limiting negative obligations, a less detailed 'balancing' test is applied in positive obligations cases. I aim to demonstrate in the following that the balancing of best interests bears a resemblance to the balancing test that the ECtHR applies to positive obligations and that the problems related to the balancing test are relevant for situations in which best interests are balanced against other interests or rights.

According to the traditional dichotomy, negative obligations require a lack of interference, whereas positive obligations require active measures.[470] Traditionally, negative obligations have been associated with civil-political rights and positive obligations with ESC rights. Although the idea of human rights as a set of indivisible, interdependent and interrelated rights is, in theory, at the core of the human rights project,[471] civil-political and ESC rights are protected in two separate covenants, with a certain hierarchy between the two sets of obligations. However, the division is not straightforward: the ICCPR imposes positive obligations too, and some obligations of the International Covenant on Economic, Social and Cultural Rights (ICESCR) are of a negative nature.[472] The CCPR has characterised the obligation to respect and ensure the ICCPR rights contained in Article 2(1) as 'both negative and positive in nature',[473] and it has further expressed that states parties' positive obligations to ensure ICCPR rights require the state to protect individuals against violations by private parties, too.[474] The Committee on Economic, Social and Cultural Rights (CESCR) has also claimed that the ICESCR contains both 'obligations of conduct' and 'obligations of result'.[475] Nowadays the negative nature of civil-political rights and positive nature of ESC rights is widely questioned,[476] as are the cost-free nature of civil-political rights, as opposed to the resource-tied nature of ESC rights, and the belief that ESC rights are vague, as opposed to the

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470 Eg Shelton and Gould, 'Positive and Negative Obligations'.

471 See eg Vienna Declaration and Programme of Action, Section 1, para 5, 1993. As Koch puts it, however, 'the fact that human rights are indivisible, interrelated and interdependent has been repeated so often and in such a variety of human rights contexts that many consider it a rhetorical slogan, a sort of mantra that has to be pronounced for the sake of good order, however, having no substantial significance in itself' (citations omitted). See Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Brill 2009) 2-3.

472 Shelton and Gould, 'Positive and Negative Obligations' 564-565.

473 Human Rights Committee, 'General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add.13 (29 March 2004), para 6.

474 Human Rights Committee, General Comment no 31, para 8.

475 Committee on Economic, Social and Cultural Rights, 'General Comment no 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' Contained in Document E/1991/23 (14 December 1990), para 1.

476 Brems, 'Human Rights: Minimum and Maximum Perspectives' 365-366.

more readily enforceable, precise civil-political rights.[477] The difference related to the negative/positive dichotomy and to resource dependency is, according to Nolan, 'one of degree' rather than 'of nature'.[478] Following another division initially developed in the context of ESC rights, state obligations can be divided into the obligations to respect, protect and fulfil human rights.[479] The CESCR has further divided the obligation to fulfil into obligations to facilitate, promote and provide.[480] The obligation to respect is negative, which means that states must refrain from interfering with the exercise of human rights. In contrast, the obligations to protect and fulfil are positive obligations. The obligation to protect means protecting individuals against violations by private parties, and the obligation to fulfil means actively creating conditions in which rights can be enjoyed and using resources to this end.[481] Quantitatively assessing the implementation of positive obligations can be difficult: it is easier to assess whether there has been a state interference with a negative right than whether sufficient positive measures have been taken to protect and fulfil a right.[482]

The concept of positive obligations has been developed especially in the jurisprudence of the ECtHR.[483] The ECtHR does not endorse the tripartite typology – respect, protect, fulfil – but relies on the division into positive and negative obligations.[484] Providing effective protection is a central logic underlying

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477 Aoife Nolan, *Children's Socio-Economic Rights, Democracy And The Courts* (Human Rights Law in Perspective, Hart Publishing 2011) 24.

478 Ibid 30.

479 See A Eide (UN Special Rapporteur on the Right to Food), 'Report on the right to adequate food as a human right' UN Doc E/CN.4/Sub.2/1987/23 (7 July 1987), paras 66-69; see also Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1980) 52, who suggested that three types of duties exist for every basic right (ie 'such vital needs as food, shelter, health care, and education'): duties to avoid depriving, duties to protect from deprivation and duties to aid the deprived. Shue stressed that the distinction is between duties and not between different kinds of rights, see ibid 5, 52.

480 Committee on Economic, Social and Cultural Rights, 'General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/2000/4 (11 August 2000), paras 33 and 37; Committee on Economic, Social and Cultural Rights, 'General Comment No. 12: The Right to Adequate Food (Art. 11)' E/C.12/1999/5 (12 May 1999), para 15.

481 Shelton and Gould, 'Positive and Negative Obligations' 566. For a critique of the tripartite typology, see Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* 13-20.

482 Coomans, Grünfeld and Kamminga, 'Methods of Human Rights Research: A Primer' 186; I also thank Andrew Novak for pointing this out.

483 The ECtHR first confirmed that the ECHR gives rise to positive obligations in *Marckx*, after which it has developed a vast body of case law on positive obligations. See *Marckx v Belgium* [plenary], no 6833/74, 13 June 1979, para 31. For background and criticism of positive obligations in the ECHR system, see Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* 2-9.

484 Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* 12.

the Court's view that the ECHR contains positive obligations.[485] The principle of effectiveness can also contribute to determining the scope of positive obligations, particularly concerning procedural obligations.[486] The Court has recognised that 'the boundaries between the State's positive and negative obligations under this provision [Article 8] do not lend themselves to precise definition';[487] nevertheless, it routinely uses the distinction.

What kind of consequences does the negative/positive dichotomy have? In the context of the ECtHR, Lavrysen claims that the Court constructs negative obligations as 'archetypical human rights obligations' and positive obligations as exceptional, displaying a preference for the former. The preference for negative obligations is visible, for instance, in that the ECtHR takes the existence of negative obligations for granted but assesses the existence of positive obligations separately in each case.[488] Furthermore, there is an implicit bias in favour of preserving the current state of affairs, which is demonstrated, for example, by the lack of requirement for the state to show in positive obligations cases that it has struck a fair balance between the applicant's and the state's interests. Consequently, the applicant carries the burden of proof. Lavrysen has noted that the Court applies the proportionality test in a less rigorous manner in positive obligations cases under Articles 8–11 in particular, as opposed to negative obligations cases under the same articles. Whether a case is conceptualised as positive or negative may, thus, determine the outcome.[489]

Lavrysen claims in the ECHR context that the distinction between positive and negative obligations does not have a sound foundation. The dichotomy can be regarded as resting on two assumptions: contrasting the notion of state with non-state and the notion of action with inaction or omission. However, this is controversial because ECtHR jurisprudence does not offer clear instructions for distinguishing between the state and private actors, which blurs the boundaries between positive and negative obligations, too.[490] Distinguishing actions and omissions is strongly affected by the chosen baseline, and the baseline is affected by ideas concerning the role of the state and whether the status quo should be

485 Eg *Airey v Ireland*, App no 6289/73, 9 October 1979, para 24.

486 Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* 151; Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Bloomsbury Publishing 2004) 221.

487 *Keegan v Ireland*, App no 16969/90, 26 May 1994, para 49.

488 Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* 214-216.

489 Ibid 236.

490 Ibid 242-260.

preferred.[491] While the value-laden nature of choosing the baseline does not mean that the negative/positive distinction is entirely unhelpful, recognising its constructed nature is important; it can be argued that the distinction is not sufficiently clear-cut to justify a lower level of protection in positive obligations cases.[492] Depending on the baseline, the same action can be considered as an action or omission.[493]

This partly artificial dichotomy between positive and negative obligations is relevant from the perspective of the best interests of the child because best interests are often conceptualised as requiring active measures from the state. As discussed earlier, Article IV indicated that the CRC Committee sees the best interests concept as a positive obligation. Understanding the preference for 'archetypical' negative obligations illuminates the dynamics of a minimalist approach to human rights protection. In the ECHR limitation test, a limitation is acceptable if it is in accordance with the law, serves a legitimate aim and is necessary in a democratic society.[494] In negative obligations cases, a failure to fulfil any of these criteria will result in a violation, whereas in positive obligations cases, the Court usually uses a one-step test to determine whether a 'fair balance' was struck.[495] The problem with this one-step test is that the scrutiny is likely to be lighter than in negative obligations cases, given that there is no reference to legality and the legitimacy of the aim is not a separate test but is merged with the overall examination of a 'fair balance'. As the legitimacy of the aim is not scrutinised, it is more likely that courts more easily accept the restrictions of positive obligations due to aims that would not be considered legitimate if they were assessed with the three-step test.[496] Furthermore, in positive obligations cases, the ECtHR tends to assume that the state has acted in accordance with the fair balance test, whereas in negative obligations cases, the approach is stricter. Consequently, the applicant is more likely to bear the burden of proof in positive obligations cases than in negative obligations cases.[497]

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491 Ibid 267; see also Nolan who argues in the context of children's socio-economic rights that when courts are handling questions related to the obligations to respect, protect and fulfil, the obligation to fulfil is the most controversial as the court's actions concerning the obligations to respect and protect aim to re-establish the status quo whereas actions concerning the obligation to fulfil alter the status quo. See Nolan, *Children's Socio-Economic Rights, Democracy And The Courts* 40.

492 Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* 305.

493 Ibid 269; for criticism on the division between positive and negative obligations, see also Susan Bandes, 'The Negative Constitution: A Critique' (1989) 88 Michigan Law Review 2271.

494 Letsas, 'The scope and balancing of rights. Diagnostic or constitutive?'.

495 Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* 222.

496 Ibid 221-225.

497 Ibid 236-237.

This study indicates that the balancing of interests in cases concerning the best interests of the child resembles the fair balance test in positive obligations cases. When the best interests of the child conflict with other interests, the CRC Committee advises resolving the conflict 'on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise'.[498] As discussed earlier, balancing is often obscure: no clear guidelines exist for balancing two rights or interests because balancing must take place separately in each case. Lavrysen has criticised 'fair balance' for being more ambiguous than the necessity test used to assess whether negative obligations have been violated.[499] It seems that even when the relevant obligations in a best interests case are negative, courts conduct a balancing of interests instead of systematically assessing each element of best interests or each relevant right in terms of whether it can be limited. At worst, such an approach can lead to limiting non-derogable rights.

I argue that if the best interests concept is understood in an outcome-focused manner in a context in which rights are limited – in a 'minimalist' environment –, identifying which rights are at stake and regularly applying the necessity test or similar general criteria for limiting human rights instead of balancing would lead to better results from the perspective of children's rights. Criteria for limiting rights are not clear-cut either as the necessity test also involves balancing between different rights, for which no clear criteria exist. The criteria are, however, stricter concerning the legitimacy of the aim, whereas in the balancing exercise allows arguments such as interest in immigration control to remain more easily hidden. Even if the legitimacy of the aim was not scrutinised very thoroughly,[500] applying the criteria for limiting human rights would force the court to articulate which rights it understands the best interests of the child to cover in the case at hand. Considering the general unclarity concerning the criteria under which the best interests of the child can be limited, it would be beneficial to identify the relevant rights more explicitly.[501]

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498 GC14, para 39; see also section 2.4.

499 Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* 221-237.

500 Eg Jean-Baptiste Farcy, 'Equality in Immigration Law: An Impossible Quest?' (2020) 20 Human Rights Law Review 725-744, 739-740, concerning the ECtHR's scrutiny in issues concerning non-discrimination. As Farcy notes, a deeper scrutiny could be perceived problematic from the point of view of separation of powers and subsidiarity.

501 Similarly, see Meda Couzens, 'The Best Interests of the Child and the Constitutional Court' (2019) 9 Constitutional Court Review 363-386, 375, who argues in the South African context that defining what the constitutional obligation concerning best interests requires is necessary to assess whether a limitation to that right meets the criteria for limiting constitutional rights.

6.5 Presumptions and case-by-case assessments

The thesis identified patterns of use of the best interests concept that may help reveal why the concept appears confusing. One pattern has to do with rebuttable presumptions versus case-by-case assessment. The idea of case-by-case assessment was already central to this study due to the research design: all the articles studied the best interests concept in individual cases (Articles I–III) or different contexts (Article IV). Case-by-case assessment is an inevitable aspect of the best interests concept. Articles II and III, however, indicate that presumptions may lead to more child-friendly outcomes than case-by-case assessments, and Article IV implies that structures are better than strong discretion.

The idea of prioritising presumptions over case-by-case assessment seems counterintuitive: in the drafting of the CRC, the best interests concept was often portrayed as a backdoor, something that could be invoked to protect children when the normal human rights logic failed to provide satisfactory solutions. Furthermore, the flexible nature of the best interests concept is usually mentioned as a strength of the concept,[502] which I myself argued in Article I.[503] It seems, however, that when decision-makers focus on identifying which outcome is best for the child, presumptions that are in accordance with the CRC may lead to better solutions from the perspective of children's rights than case-by-case assessments. Article II found, for instance, that the ECtHR relies on a presumption of family unity in child protection cases but tends to assess family ties separately in immigration cases, which often leads to outcomes that prioritise immigration control.

Determining the best interests of the child beforehand and not allowing any exceptions would obviously lead to problematic solutions, especially as rigid presumptions contravene the purpose of the best interests concept.[504] Stalford has pointed out that a lack of shared values complicates making best interests assessments based on generalised circumstances or ideals.[505] Earlier scholarship has underlined the problems of relying on assumptions in decision-making without questioning them.[506] For example, Skivenes has expressed concern about courts assuming in adoption cases that children's best interests require connection

502 Vandenhole and Türkelli, 'The Best Interests of the Child'.

503 Although the dangers of case-by-case assessment from the point of legal certainty are also mentioned often.

504 On the difficulties of presumptions, see Archard and Skivenes, 'Balancing a Child's Best Interests and a Child's Views' 8.

505 Stalford, 'The broader relevance of features of children's rights law: the "best interests of the child" principle' 42-43.

506 Christine Piper, 'Assumptions about children's best interests' (2000) 22 Journal of Social Welfare and Family Law 261.

with biological parents.[507] An often-recognised concern in the children's rights framework is that the CRC's default position views children as a homogenous group.[508] Does this 'not risk pushing out of sight violations of children's rights based on criteria other than age, such as social and economic conditions, gender, sexual orientation, nationality, ethnicity, race or social origins'?[509] Mustasaari has argued that best interests can be understood as an intersectional legal tool that helps incorporate knowledge about the child's intersectional identity and individual circumstances into legal decision-making.[510] Similarly, Simon has argued that the best interests concept can serve as a tool through which considerations of cultural diversity are incorporated into decision-making – although, as she also notes, a reverse result is often achieved in practice.[511] From this perspective, carefully assessing the best interests of the child in each case enables the assessment to be tuned to variations in the child's positionalities and experiences as well as to interests and rights not explicitly recognised in the CRC. Tobin argues that children's opportunity to shape their rights by expressing their opinions and bringing in interests not listed in the CRC allows the convention to evolve in an inclusive manner.[512] Consequently, the best interests concept could advance an evolutive interpretation of the CRC that better accounts for children's heterogeneity. Recognising children's diverse realities may also result in better acknowledgment of the links between best interests and the prohibition of discrimination, which is all the more important as the concept has been used to justify, for example, forcible removals of indigenous children from their families.[513] Therefore, it is clear that a human rights-compliant use of the best interests concept requires an amount of discretion and consideration of the individual child's circumstances.

However, it is important to recognise that a case-by-case assessment of best interests that takes account of a child's intersectionalities has many caveats in

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507 Skivenes, 'Judging the Child's Best Interests: Rational Reasoning or Subjective Presumptions?' 349-350.

508 See eg Anna Holzscheiter, Jonathan Josefsson and Bengt Sandin, 'Child rights governance: An introduction' (2019) 26 Childhood 271, 272-273.

509 Karl Hanson and Noam Peleg, 'Waiting for Children's Rights Theory' (2020) 28 The International Journal of Children's Rights 15, 22.

510 Mustasaari, 'Best interests of the child in family reunification – a citizenship test disguised?'. Intersectionality has several definitions, but the core idea is that social identities, including age, gender and class, overlap and amplify discrimination. Thus, children's experiences cannot be reduced solely to their age. The concept was introduced by Crenshaw in the context of gender and race, see Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139. In the context of children's rights, see Jessica Dixon Weaver, 'Intersectionality and Children's Rights' in Jonathan Todres and Shani M. King (eds), *The Oxford Handbook of Children's Rights Law* (Oxford University Press 2020); Nolan, *Children's Socio-Economic Rights, Democracy And The Courts* 20-21.

511 Caroline Simon, 'The "best interests of the child" in a multicultural context: a case study' (2015) 47 The Journal of Legal Pluralism and Unofficial Law 175.

512 Tobin, 'Justifying Children's Rights' 434.

513 Vandenhole and Türkelli, 'The Best Interests of the Child' 208-209.

practice, such as the decision-makers' assumptions possibly affecting the outcome. Daly has pointed out that the best interests concept 'permits the imposition not only of *society's* dominant values, but those values of *the types of individuals that become judges* – generally white, middle class males (and always adults, of course)'.[514] The use of presumptions in some case groups and not in others, or using different presumptions in largely similar legal questions (eg associating adaptability with the child's age in immigration cases), appears problematic in light of this study. As Simon has argued, the notion of the best interests of the child is 'neither obvious nor natural, but socially constructed'.[515] It is important to recognise the extent to which differences in conceptualising the best interests of the child in various case groups reflect these socially constructed ideas and to not take the differences as a fact.

Defining best interests separately in each case appears appealing because of its flexibility. In reality, however, it may hide discriminatory practices. It is essential to complement case-by-case assessments with safeguards such as hearing children and taking other relevant rights into account.[516] Indeed, the dangers of subjectivity and even abuse of the best interests concept are likely best mitigated by adopting a process in which decision-makers are required to consider a predefined set of factors[517] rather than by assuming that each child's circumstances will evidently be taken into account on a case-by-case basis. Clearly, presumptions should be neither discriminatory nor based on stereotypes, such as mothers as carers and fathers as breadwinners.[518] It is equally important to not equate children's best interests with dominant social and cultural values or to not assume that traditional social arrangements will inevitably benefit children.[519]

6.6 From substantive to procedural and structural: a 'governance architecture' of the best interests of the child

A central claim of the thesis is that in the current human rights framework, Article 3(1) works best if understood as a predominantly procedural obligation.

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514 Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill 2018) 94, emphasis original; similarly, see Fenton-Glynn, 'Children, parents and the European Court of Human Rights' 647.

515 Simon, 'The "best interests of the child" in a multicultural context: a case study' 181.

516 See eg Vandenhole and Türkelli, 'The Best Interests of the Child' 216-217.

517 Eekelaar and Tobin, 'Article 3: The Best Interests of the Child' 84-95; Eekelaar and Tobin list the views of the child, other rights under the CRC and other international human rights treaties, parents' and other relevant persons' views, the child's individual circumstances (including social and cultural practices), and relevant empirical evidence.

518 Concerning stereotypes in human rights law, see Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 Human Rights Law Review 707.

519 Eekelaar and Tobin, 'Article 3: The Best Interests of the Child' 91.

In light of the analysed human rights practice in Articles I and II, it seems that an outcome-focused understanding of best interests often results in inconsistencies between case groups. An inconsistent application of the best interests concept is problematic from the perspective of non-discrimination as enjoyment of human rights becomes dependent on context. Article III argued that a procedural understanding is logical in light of the object and purpose of the CRC. The article claimed that the functions of the concept as a substantive right and interpretive principle do not provide sufficient added value compared to relying on children's already-existing rights. Instead, a procedural understanding is more promising: it allows for a more consistent use of the concept in various fields, even if the child is not formally a party to the case. Article IV further underlined the importance of structures in safeguarding the best interests of the child.

While this thesis's claim of best interests being a procedural obligation originates from the concept's nature, it also has to do with the observation that a procedural understanding seems promising within the limits of the current system. A procedural understanding removes, for example, the need to balance interests, which is one pitfall of an outcome-focused understanding, as demonstrated earlier. If Article 3(1) is understood as a procedural obligation, it is easier to apply regardless of the field of law. Some of the CRC Committee's recent views based on individual communications align well with a procedural understanding. The Committee has found a violation of Article 3(1) because of a failure, for example, to consider the best interests of the child when assessing the risk of a girl being subjected to genital mutilation if deported,[520] to assign a representative to an unaccompanied minor during an age determination process to represent the child's interests[521] and to consider the best interests of a five-year-old and hear her in deciding about granting her a humanitarian visa.[522] In the future, it will be

520 *I.A.M. v. Denmark: Views Adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, concerning communication No. 3/2016*, CRC/C/77/D/3/2016 (8 March 2018) paras 11.8-11.10. In addition, a violation of Article 19 was found. See also Vandenhole and Türkelli, 'The Best Interests of the Child' 213-214.

521 *N.B.F. v. Spain: Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 11/2017*, CRC/C/79/D/11/2017 (27 September 2018) paras 12.8-12.9; this also led to a breach of Article 12.

522 *Y.B. and N.S. v. Belgium: Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 12/2017*, CRC/C/79/D/12/2017 (27 September 2018) paras 8.8-8.9; the Committee also found a breach of Article 12. See also Gamze Erdem Türkelli and Wouter Vandenhole, 'Communication 12/2017: Y.B. and N.S. v Belgium' (*Leiden Children's Rights Observatory*, Case Note 2018/3, 10 December 2018) <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/jeugdrecht/jr-case-note-3-clean-version---7.12.18.pdf> accessed 21 January 2021.

important to develop the procedural approach further and concretise it. The CoE Guidelines for Child-Friendly Justice, for example, can be useful in this regard.[523]

It is important to note that Articles I and II do not allow the conclusion that there would be a causal relationship between an outcome-focused understanding of the best interests concept and the inconsistencies in the jurisprudence. As discussed in this summary, other reasons, such as the underlying logic of immigration law, also contribute to the insufficient role given to best interests in immigration cases. The differences in the level of human rights protection certainly involve other factors, too, such as the finding that in some contexts, non-legal information is given more space than in others; Article II showed that expert evidence is relied on more frequently in child protection cases than in immigration cases. Articles I and II do imply, however, that an outcome-focused understanding may reinforce – or, at least, has not reduced – these inconsistencies. A procedural approach may help judges to assess possible violations in cases in which determining whether the relevant substantive right has been breached is difficult, which is particularly the case when measuring states' obligation to fulfil human rights. Reviewing whether a procedural obligation to obtain the child's views, for instance, has been followed may be more straightforward than reviewing whether substantive obligations have been followed, although assessing compliance with procedural obligations is also not simple.[524]

Article IV takes the approach of Article III further. I argued in Article IV that the Committee's focus on structures – the six cross-cutting themes that require state action – can be interpreted to suggest that creating structures that advance the implementation of human rights in general is the best way to implement Article 3(1). In general, this focus implies that structures may be more important than content in implementing human rights; through advising states on implementing Article 3(1), the Committee unveils its broader views about the functioning of the international human rights system as a whole and the implementation of children's rights. As I discussed in Article IV, the CRC Committee often displays a procedural understanding in the COs by, for example, criticising states for a lack of evidence for their application of the best interests concept, emphasising the need to

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523 Committee of Ministers of the Council of Europe, 'Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice' (17 November 2010). For an analysis of the guidelines, see Ton Liefaard, 'Child-Friendly Justice: Protection and Participation of Children in the Justice System' (2016) 88 Temple Law Review 905.

524 Procedural positive obligations have been categorised into 1) investigative obligations, 2) access to remedies and 3) careful decision-making procedures. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* 60-78; see also Eva Brems, 'Procedural protection: an examination of procedural safeguards' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013) 140-147; Jonas Christoffersen, *Fair Balance: Proportionality and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 521.

independently assess best interests and recommending that legal reasoning should specify the criteria used to assess best interests.[525] Access to justice is reflected, for example, in the recommendation that a national mechanism should be available to appeal against decisions taken without a proper best interests assessment.[526]

The six cross-cutting themes demonstrate the importance of domestic structures in implementing human rights and, therefore, participate in the broader trend towards the 'domestic institutionalisation' of human rights that I mentioned in Article IV.[527] Increased use of a procedural approach (or 'proceduralisation of rights') has previously been considered to be one of the worldwide 'converging trends towards a domestic institutionalisation of human rights'. These trends share an institutional focus; they are all related in some ways to the importance of domestic institutions in international human rights law.[528] According to the definition by Jensen, Lagoutte and Lorion, who argue that the conceptual dimension of institutionalisation has not received much academic attention, institutionalisation has a narrower focus than implementation; institutionalisation 'can be defined as a process in which a set of norms become an integral and sustainable part of a system. It relies on the change processes, which lead to altered yet standardised and routinised practices and beliefs'.[529]

I argued in Article IV that the focus on structural elements implies that 'the Committee has created a "governance architecture" for the best interests of the child'.[530] By this, I meant that instead of focusing on the content of the concept, the Committee focuses on describing what kind of structures need to be in place for the best interests of the child to be properly implemented. The idea of a governance architecture[531] illustrates well the structural and spatial dimensions of human rights protection visible in the CRC Committee's approach. Jensen, Lagoutte and Lorion note that characterisations made in previous research concerning the role of national human rights institutions 'speak to larger issues around spatial, structural and even systemic features in national human rights protection'. The

525 Article IV, 111-112, 118.

526 Article IV, 115.

527 Article IV, 120; Steven L. B. Jensen, Stéphanie Lagoutte and Sébastien Lorion, 'The Domestic Institutionalisation of Human Rights: An Introduction' (2019) 37 Nordic Journal of Human Rights 165.

528 Ibid 165-166; the other trends are national human rights institutions, specific guidance by international human rights bodies on implementing rights nationally, specific guidance on implementing rights nationally in more recent human rights instruments, a new 'development paradigm', and academic theories where state compliance is considered significant.

529 Ibid 170-171, emphasis omitted; see the special issue (2019) 37(3) of Nordic Journal of Human Rights 'The Domestic Institutionalisation of Human Rights'.

530 Article IV, 120.

531 Tara Collins and Lisa Wolff, 'Work in Progress: Twenty-five Years of the Convention on the Rights of the Child – The General Measures of Implementation Across the Globe' (2014) 1 Canadian Journal of Children's Rights 85, 86.

framings, therefore, share 'a focus on the spatial dimension in domestic human rights protection'.[532] Along the same lines, Eekelaar and Tobin have characterised the measures the CRC Committee expects from states in General Comment no 22 as onerous and resource intensive. However, they submit that notwithstanding the broad scope, the 'measures do not depend on any determinate perception of children's best interests. Rather, they call for a "process" whereby the consequences of actions and decisions may be more consistently taken into account'.[533]

While the procedural and structural approaches are potentially beneficial for the rights of the child, it is important to acknowledge their limitations, too. One concern associated with the procedural approach is the weakening of the substantive protection of children's rights. As an introduction to the possible problems, I discuss here the controversial Grand Chamber case of *Strand Lobben*, mentioned in section 5.2, because the case has been strongly criticised for adopting a purely procedural approach and for concentrating on micromanaging national decision-making instead of offering guidance on substantive human rights standards.[534] While the majority of the Chamber considered the boy especially vulnerable and found no violation (on the grounds of not terminating his placement and subsequent adoption) because the mother had been unable to care for him, the majority of the Grand Chamber held that Article 8 had been breached. According to the Grand Chamber, the decision-making process had not had a sufficient factual basis.

I perceive the reasoning of the Grand Chamber judgment problematic from the perspective of the best interests of the child not because the Court took a procedural approach to best interests but because the Court did not pay sufficient attention to them. The son was an applicant in the case, but it seems that his views were not sought in the process at all (or, at least, they are not visible in the judgment), which is especially strange given that he was ten years old at the time of the Grand Chamber judgment.[535] This goes against the CRC Committee's guidelines that a best interests determination is not possible without obtaining the child's views. The Grand Chamber did not concentrate on reviewing whether

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532 Jensen, Lagoutte and Lorion, 'The Domestic Institutionalisation of Human Rights: An Introduction' 175; see the references to Cardenas, Mertus and Meyer.

533 Eekelaar and Tobin, 'Article 3: The Best Interests of the Child' 82; see General Comment no 22, paras 27-33.

534 Laurens Lavrysen, 'Strand Lobben and Others v. Norway: from Age of Subsidiarity to Age of Redundancy?' (*Strasbourg Observers*, 23 October 2019) <https://strasbourgobservers.com/2019/10/23/strand-lobben-and-others-v-norway-from-age-of-subsidiarity-to-age-of-redundancy/#more-4441> accessed 21 January 2021.

535 Similarly, see Marit Skivenes, 'Child protection and child-centrism – the Grand Chamber case of Strand Lobben and others v. Norway 2019' (*Strasbourg Observers*, 10 October 2019) <https://strasbourgobservers.com/2019/10/10/child-protection-and-child-centrism-the-grand-chamber-case-of-strand-lobben-and-others-v-norway-2019/> accessed 21 January 2021.

best interests had been properly assessed at the national level, although it did note lacking up-to-date expert evidence at the time of the domestic judgment. Another problem was noted by the dissenting judges: the mother was allowed to represent the son despite conflicting interests. Consequently, the son's interests were not properly represented in the court, which complicates the assessment of whether his best interests had properly been considered on the national level.[536] It seems, therefore, that the problematic aspects of the Grand Chamber judgment are a result of the Court focusing on assessing the case from the mother's and not from the son's perspective, rather than from the procedural approach. As the dissenting judges noted, criticising national authorities for the fact that they 'focused on the child's interests instead of trying to combine both sets of interests'[537] is an odd formulation.[538] Nevertheless, *Strand Lobben* demonstrates that a procedural approach has to contain sufficient safeguards from the perspective of the best interests of the child, otherwise a pure procedural review may be detrimental to children's rights. The dissenting judges criticised the majority reasoning for using the shortcomings in the national procedure as a shield for justifying the desired outcome.[539] Such a development is not desirable.

Regardless of whether one considers the reliance on a procedural approach in *Strand Lobben* a good development, the case raises important questions underlined in previous research, too. Are courts, especially international courts, capable of retrospectively assessing the quality of decision-making? How can the predictability of the procedural approach be ensured? Can we ensure that a procedural approach is not discriminatory towards vulnerable groups?[540] Similar concerns are relevant for domestic institutionalisation; Jensen, Lagoutte and Lorion ask whether, in a similar way to proceduralisation, the domestic institutionalisation of human rights risks focusing on fulfilling more formal requirements instead of substantial issues, which might have consequences for compliance with human rights obligations.[541] These concerns have to be taken seriously. I consider it important not to resort to a purely procedural review but,

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536 Joint dissenting opinion of judges Koskelo and Nordén on the question of the first applicant's right to represent the second applicant. Similarly, see Fenton-Glynn, 'Children, parents and the European Court of Human Rights' 648-649. The CoE Guidelines for Child-Friendly Justice contain a provision on children's independent representation in case of a conflict of interests (37).

537 Para 220.

538 Joint dissenting opinion of judges Kjølbro, Poláčková, Koskelo and Nordén on the merits of the case; see also Fenton-Glynn, 'Children, parents and the European Court of Human Rights' 648-649.

539 Joint dissenting opinion of judges Kjølbro, Poláčková, Koskelo and Nordén on the merits of the case, para 16.

540 Peter Cumper and Tom Lewis, 'Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court of Human Rights' (2019) 68 International and Comparative Law Quarterly 611; Kati Nieminen, 'Eroding the protection against discrimination: The procedural and de-contextualized approach to *S.A.S. v France*' (2019) 19 International Journal of Discrimination and the Law 69; see also Article III, 765-766.

541 Jensen, Lagoutte and Lorion, 'The Domestic Institutionalisation of Human Rights: An Introduction' 173.

instead, to ensure the quality of the review by following the checklist approach and focusing on certain elements, such as obtaining the child's views.

Another possible counterargument to relying on the procedural approach is practical. According to my suggestion, an appropriate use of the procedural approach to best interests entails that children's substantive rights are articulated in terms of their rights and not their best interests. But what if other rights are simply left out of the equation? Previous research has found that national courts prefer Article 3(1) over other CRC provisions and that Article 3(1) has often opened doors for other rights to enter the argumentation of courts.[542] A danger of a procedural approach to the best interests of the child could, therefore, be that if other rights are not sufficiently applied in national courts, the procedural approach to Article 3(1) could lead to further sidelining of children's rights. At the same time, it can be argued that having a clearer idea of the relationship between best interests and other rights would contribute to an opposite development, especially as previous research has shown that overly relying on the best interests of the child may be detrimental for the development of other rights.[543]

Finally, the added value of the best interests concept when understood as a procedural obligation can be debated. I argue that compared to existing procedural rules, the concept directs attention towards assessing the impact of decisions on children's rights and potentially mitigates the differences between case groups. In addition, placing a stronger emphasis on the procedural dimension of the concept increases transparency, as decision-makers must justify why a certain outcome was reached. It also offers a checklist for decision-makers. Hearing children in matters concerning them, for example, is usually not guaranteed equally across case groups, and courts do not always actively seek information about the child's circumstances.[544] Children are often not parties in cases concerning them, but

542 Couzens, 'The application of the United Nations Convention on the Rights of the Child by national courts' 195-198, 206.

543 Ibid 196.

544 In Finnish administrative procedure, for example, administrative courts and authorities have an obligation to actively obtain evidence (eg expert statements) if the impartiality and fairness of the procedure and the nature of the case so require (section 37 of the Act on Judicial Procedure in Administrative Matters 808/2019, no English translation yet). According to a study on public care proceedings in administrative courts, the courts obtained evidence on their own initiative only incrementally; the study was conducted during the old Administrative Judicial Procedure Act. See Virve-Maria de Godzinsky, *Huostaanottoasiat hallinto-oikeuksissa. Tutkimus tahdonvastaisten huostaanottojen päätöksentekomenettelystä (Taking a child into care. Research of decision making in administrative courts)* (National Research Institute of Legal Policy 2012) 74-77. The preparatory works of the new act clarify that the obligation to obtain evidence is broader if the party is in a weaker position than officials or the decision has a particular significance for the right to fair trial of the individual concerned. It is stated that such a situation could be at hand in a case concerning a fundamental right. See Government Bill 29/2018 (HE 29/2018 vp). Hallituksen esitys eduskunnalle laiksi oikeudenkäynnistä hallintoasioissa ja eräiksi siihen liittyviksi laeiksi [Government Bill to the Parliament concerning the Administrative Judicial Procedure Act and certain related Acts], 36.

the best interests concept obliges decision-makers to consider the impact of the decision on children.[545]

6.7 Limitations of the study

When interpreting the findings of this thesis, some limitations of the study must be kept in mind. It is, for example, important to reflect on the division of powers between courts, the legislative branch and the executive branch. I have argued that the SAC and ECtHR should aim for more ambitious interpretations of the best interests of the child to better align with the CRC. However, is it realistic or desirable to expect such an active role from courts? The problem exists on at least three levels.

Firstly, the traditional doctrine of the separation of powers provides that the three functions of government should remain separate.[546] From the perspective of Finnish constitutional law, it is questionable how much judicial activism can be expected from the SAC. It can be argued that the legislator is responsible for incorporating human rights treaties and that courts cannot be expected to play the primary role in the enforcement of human rights. Secondly, according to the 'counter-majoritarian difficulty', unelected judges should not act in a way that constrains the democratically elected representatives from realising the will of the majority.[547] Related to this, supranational and national courts increasingly maintain a dialogue with each other, and the national legislator does not have tools to participate in this dialogue. The third discussion is related to the division of labour between international and national levels, and it is firmly intertwined with subsidiarity. Far-reaching interpretations may be problematic for the legitimacy of courts, especially international courts.[548] The ECtHR has been blamed for creating far-reaching criteria for domestic judicial design, thus going beyond its original role, reducing the margin of democratically elected decision-makers and, at the same time, increasing its own power. Such an approach has been considered at odds with the fact that engaging in domestic judicial design requires a deep

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545 See eg Haugli and Shinkareva, 'The Best Interests of the Child Versus Public Safety Interests: State Interference into Family Life And Separation of Parents and Children in Connection with Expulsion/ Deportation in Norwegian and Russian Law' 352; Tobin, 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children' 588.

546 See eg M Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998) 18-19; as Vile demonstrates, there are different versions of the doctrine.

547 The expression originates from Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press 1986) 16-17; also called 'counter-majoritarian objection'.

548 Concerning the ECtHR's legitimacy, see eg Maija Dahlberg, 'Do You Know It When You See It? A Study on the Judicial Legitimacy of the European Court of Human Rights' (doctoral thesis, Publications of the University of Eastern Finland. Dissertations in Social Sciences and Business Studies 2015).

understanding of the relevant state's constitutional law.[549] Along the same lines, it has been argued that the ECtHR should be careful not to go too far in limiting national legislative, executive and judicial freedom.[550]

However, these points of criticism are not insurmountable, although they have to be taken seriously. Previous research on the separation of powers has underlined that the discussion is often based on a 'mistaken narrative' – on an ideal that has never existed in practice.[551] It has also been argued that the idea of courts reviewing state action neglects the problem of distinguishing action from inaction,[552] even though the distinction between the two is artificial, as discussed in section 6.4. Courts inevitably participate in implementing human rights law and developing it further. Although the separation between the courts and the legislature is an important consideration, it is equally important to realise the unfeasibility of maintaining a strict divide. As Koch observes, 'the issue today is not *whether* judicial bodies have a say in disputes concerning resource demanding issues but *where* to draw the line between judicial and legislative powers when the disputed measures are resource demanding and the legal basis vaguely worded'.[553] This point applies both to legal decision-making in general and to the best interests concept more specifically. As the scope of the best interests concept is so broad and courts are explicitly mentioned in Article 3(1), courts unavoidably play a key role in determining its content in individual cases. On the Finnish level, too, a shift has taken place from the legislative sovereignty paradigm towards increased use of rights-based judicial review, where courts are crucial to monitoring compliance with human rights treaties.[554] The legislator alone is not able to safeguard the enjoyment of human rights. Furthermore, Nolan has argued that children's exclusion from majoritarian democratic processes weakens the counter-majoritarian objection as children are not properly represented in society.[555] Finally, by ratifying a convention, states accept that its specific content is determined through the interpretations of its monitoring body. In practice, international courts and monitoring bodies constantly navigate between, on the one hand, defining the scope of rights as widely as possible to protect human

549 David Kosař and Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109 The American Journal of International Law 713.

550 Geir Ulfstein, 'Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties' (2019) The International Journal of Human Rights 1, 4.

551 Christoph Moellers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013) 8-9.

552 Nolan, *Children's Socio-Economic Rights, Democracy And The Courts* 157.

553 Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* 26, emphasis original.

554 Lavapuro, Ojanen and Scheinin, 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review'.

555 Nolan, *Children's Socio-Economic Rights, Democracy And The Courts* 93-133.

rights and, on the other hand, meeting the demands of contracting states while working with limited resources. This tension poses a practical problem to what the systems can achieve.[556] Suggestions for increasing the legitimacy of international courts have also been presented from inside the courts.[557]

Another limitation of the study relates to criticism of 'implementation research' in children's rights research. 'Implementation research' considers 'how the rights recognised in the Convention have been realised in practice in the various areas of society' and compares implementation in different parts of the world, the monitoring system and the process for the realisation of the CRC.[558] Reynaert, Bouverne-De Bie and Vandenhole argue that implementation research focuses on a 'gap' between theory and practice without problematising the CRC standards; such research assumes 'a consensus on what children's rights are, postulating that *more* children's rights are de facto *better* for children'.[559] According to a critical view of such research, the expectation that abstract human rights provisions can be implemented in reality if we try hard enough is a fiction. These critical voices have to be kept in mind when interpreting the results of this study. Even if best interests were adequately considered in all judgments, this would not mean that the best interests standard would be 'implemented' in practice. Hathaway, for example, has found that ratification of a human rights treaty often had no apparent impact on human rights treaty practices and was sometimes associated with worse practices.[560] In contrast, Simmons has argued based on statistical analyses and case studies that human rights treaties, including the CRC, have contributed positively to the realisation of human rights – although, as Simmons underlines, the effect is not comprehensive enough.[561] Consequently, other factors are needed in addition to a perfect 'consideration' of best interests in human rights practice.

Another validity-related question is the extent to which the articles allow for broader generalisations or are bound to the specificities of the systems studied. Article I is a single-country study and, therefore, somewhat 'grounded in the cultural

556 See eg Alexandra Timmer, 'Strengthening the Equality Analysis of the European Court of Human Rights: The Potential of the Concepts of Stereotyping and Vulnerability' (doctoral thesis, Ghent University 2014) 52-58 in relation to the ECtHR.

557 See eg Paulo Pinto de Albuquerque, 'Plaidoyer for the European Court of Human Rights' (2018) European Human Rights Law Review 119.

558 Quennerstedt, 'Children's Rights Research Moving into the Future – Challenges on the Way Forward' 236.

559 Reynaert, Bouverne-De Bie and Vandevelde, 'Between "believers" and "opponents": Critical discussions on children's rights' 163-166, emphasis original.

560 Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 The Yale Law Journal 1935.

561 Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* 307-348; for criticism of Simmons' approach, see eg Samuel Moyn, 'Do human rights treaties make enough of a difference?' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (2012).

specificities of one country'.[562] How much Article I allows for generalisations about considering best interests in other countries (and, in Finland, in contexts other than the SAC) can be debated. It is, however, likely that similar challenges exist in other legal orders, too. The differences between the CRC Committee's focus on active measures and the ECtHR's focus on resolving conflicts between rights are partly explained by the bodies' varied functions, as previously discussed.

A related question is how much the Committee's structural approach and the ECtHR's procedural approach are related to these bodies' understanding of the best interests concept rather than the Committee's role and working methods and the ECtHR's status as a supranational court. As I discussed in Article IV, the focus on active measures in the COs can be partly explained by the CRC Committee's role in guiding states in implementing their treaty obligations. However, COs are the Committee's main activity, and especially in COs prior to GC14, it is reasonable to expect them to reflect the Committee's understanding of the CRC on a more general level.[563] Concerning the ECtHR, however, it is possible to claim that the need for a procedural approach arises from its institutional position as a supranational court operating with subsidiarity and margin of appreciation. Indeed, as I noted in Article III, the examination of procedural review in the context of the ECtHR can give too optimistic a view of a procedural approach to best interests. Article III demonstrated, however, that a procedural understanding is supported by the nature of Article 3(1) CRC. Consequently, national courts should act similarly, reviewing whether a best interests assessment has taken place and examining indications of quality, such as whether the child's views have been obtained and the decision is based on expert evidence. The substantive assessment of the outcome of the case should be articulated with reference to the rights of the child.[564]

Finally, an important limitation of this study is paradoxically what is interesting about it: that it focuses on the concept of the best interests of the child. This thesis circles around one paragraph of one article of one human rights treaty. The research questions are framed with a CRC provision, Article 3(1) – in other words, an artificially constructed box. A number of counterarguments can be directed at this approach. It is likely, if not certain, that when focusing on argumentation concerning best interests, I have missed other interesting aspects of the materials studied. In child protection cases, for example, a problem with an approach focusing on best interests is that child protection is both always and never about best interests – always in that protecting the child is the only acceptable reason for interfering in family life in child protection cases and never in that fulfilling

562 See Landman, *Studying Human Rights* 142; Landman makes the observation when discussing choosing a suitable method.

563 Article IV, 120-121.

564 Article III, 751-755.

the child's best interests is not a sufficient justification for interfering in family life.[565] The real effect of the concept on the courts' reasoning can be questioned because, for instance, the ECtHR's argumentation in children's cases was quite similar even before the ECtHR introduced the best interests concept in its case law.[566] Previous studies concerning the use of CRC in national courts have found that judges often prefer open concepts, such as non-discrimination and best interests, to more specific CRC rights.[567] Although referring to Article 3(1) has been regarded a positive development in that it has opened doors for other CRC provisions that have not been considered directly applicable by national courts, it has been argued that reliance on Article 3(1) can demotivate courts to engage with other, more specific articles and, therefore, impede their jurisprudential development.[568] However, relying on Article 3(1) has contributed to courts taking children's rights into account across fields of law, including in matters concerning children indirectly, and assigning children's own interests a central role in the reasoning.[569]

Despite the problems associated with the concept, and because of those problems, it is essential to study the practices around it and detect patterns of argumentation that are not visible without a systematic analysis. Whether we like it or not, Article 3(1) has a prominent place in the CRC, and its importance continues to be strengthened by other actors in human rights law, such as the ECtHR and national courts. It is, therefore, crucial to shed light on the meanings that the concept acquires in human rights practice as well as to critically engage with claims regarding how the concept should be understood.

565 I thank an anonymous referee for this observation concerning Article II.

566 See eg Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?' 74.

567 Vandenhole, 'Belgium' 121; Meda Couzens, 'France' in Ton Liefaard and Jaap Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2015); Couzens, 'The application of the United Nations Convention on the Rights of the Child by national courts' 69-70.

568 Couzens, 'France' 137 and references; Couzens, 'The application of the United Nations Convention on the Rights of the Child by national courts' 69-70.

569 See eg Couzens, 'The application of the United Nations Convention on the Rights of the Child by national courts' 74, concerning French courts.

7 CONCLUSION

This thesis analysed the concept of the best interests of the child in domestic, European and international human rights practice. The study aimed to discover from the perspective of human rights and constitutional law how the analysed courts and monitoring bodies – the SAC, ECtHR and CRC Committee – understand and use the best interests concept in their jurisprudence. The starting point of the analysis was the interaction and dialogue between different systems for the protection of human rights. The interaction allows the concept of the best interests of the child, originally enshrined in Article 3(1) CRC, to be used by other actors, such as the ECtHR. National courts, however, increasingly make use of provisions of regional and international human rights law.

The overall contribution of the research is that it produces new information on the application of the best interests concept in human rights practice at the domestic, European and international levels. The thesis found differences between case groups in how comprehensively the best interests of the child are considered in the SAC, if they are considered at all; as Article I showed, the SAC does not tend to consider best interests in case groups traditionally not associated with children. In the context of the ECtHR, Article II found that the assessment of best interests is particularly problematic in migrant cases as opposed to child protection cases. Article III suggested that understanding the best interests of the child as a predominantly procedural obligation helps eradicate some problematic differences between diverse fields of law. Article IV demonstrated that instead of defining the best interests concept in its COs, the CRC Committee focuses on identifying measures that states need to take to implement Article 3(1) CRC.

In addition to interaction between different systems for human rights protection, the concepts of maximalist versus minimalist human rights environments and positive versus negative obligations have helped me to contextualise the findings and understand their broader relevance. In discussing the findings of the study, I explored reasons for why the best interests concept is not adequately implemented in human rights practice and identified a minimalist approach to human rights protection as a possible reason; I argued that the best interests concept aims at maximising children's rights and that this, together with the unclarity regarding the criteria for limiting best interests, makes the concept unfit for a framework focusing on limiting rights. I also argued that the argumentation in best interests cases resembles the ECtHR's treatment of positive and negative obligations: in the former, the Court balances the interests of the individual and the general interests, whereas in the latter, stricter scrutiny is applied. In the stricter test, the legitimacy of the aim is examined more carefully than in the balancing test.

The study, therefore, suggested that if best interests are understood as a standard to measure the outcome of a decision, it would be beneficial to identify relevant children's rights in individual cases and apply the general criteria for limiting human rights to each right. The study also indicated that despite the importance of treating each child as an individual, presumptions may lead to better solutions than case-by-case assessments, provided that the presumptions are not discriminatory.

The thesis also traced a general procedural-structural trend in the ECtHR case law concerning the best interests of the child and in the COs of the CRC Committee. I further developed the idea of a procedural approach as a potentially good way to conceptualise the best interests of a child and connected this idea to the CRC Committee's focus on domestic structures in the COs and to the general procedural and structural trend in human rights protection. I argued that following procedural safeguards, such as obtaining children's views, and building domestic structures that advance children's rights in general could more effectively guarantee the best interests of the child than an outcome-focused understanding. Of course, the approach needs to be complemented with identification of the relevant rights of the child.

In addition, the thesis contributes methodologically to legal human rights research, firstly, by underlining the importance of systematic case selection in studying human rights practice and, secondly, by suggesting a new conceptualisation of comparison as a valuable method for studying relevant issues, especially vulnerable groups. More research is needed where these methods are applied. The central themes used to interpret the findings of the study, including the maximalist and minimalist understanding of human rights, the allegedly imagined dichotomy between negative and positive obligations and the emphasis on procedural and structural elements, have relevance for other human rights regimes in addition to the best interests of the child and children's rights.

The reasons explored in this thesis for why the best interests of the child are not sufficiently considered are obviously not comprehensive. Initially, I did not intend to focus on migrant cases in this thesis, but the question I posed in Article II has proved relevant to the thesis as a whole: the current human rights system allows differential treatment based on immigration status, but is positioning human rights limits differently to such an extent acceptable in light of the underlying principles of human rights?[570] In other words, what kind of stance does human rights law take to exclusion and non-nationals? The answer to this question will have – and already has had – massive implications for children's rights. The CRC Committee's jurisprudence in individual communications cases could be

570 Article II, 251. See also Dembour, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg' 88.

a step towards clarifying state obligations in this field, as the Committee has already found several violations in cases concerning migrant children. However, the Committee has already been criticised for overly careful interpretations.[571] More active interpretations would surely raise controversy, and it is not likely that the Committee's non-binding views[572] alone would fundamentally change states' immigration policies.

One way to approach the migration law controversy may be by recognising and strengthening the link between the best interests of the child and non-discrimination. The criteria that are relevant in assessing the best interests of the child correspond largely to the prohibited grounds of discrimination. It has been argued that to refugees, the duty of non-discrimination is the most potential safeguard in international human rights law,[573] although it has also been claimed that the current content of the equality and non-discrimination principle has conceptual flaws from the perspective of migration law.[574] Currently, non-nationals do not enjoy the same rights as citizens, although they can rely on the prohibition of discrimination.[575] This thesis showed, among other things, that the ECtHR currently examines the best interests of the child predominantly under Article 8 only. The preference for Article 8 is exacerbated by the ECtHR's tendency not to examine complaints under Article 14, the non-discrimination provision, if it has already found a violation concerning the same issues under other ECHR provisions.[576] This general trend, which has been criticised in previous research,[577] might be detrimental for the best interests of the child for two reasons.

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571 See eg Ursula Kilkelly, 'Communication 33/2017: E.P. and F.P. v. Denmark' (*Leiden Children's Rights Observatory*, Case Note 2020/1, 18 February 2020) <https://childrensrightsobservatory.nl/case-notes/casenote2020-1> accessed 21 January 2021.

572 According to Article 11(1) OP3, the respondent state must give 'due consideration to the views of the Committee'.

573 James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 123.

574 Farcy, 'Equality in Immigration Law: An Impossible Quest?'

575 See especially Article 26 ICCPR; as Hathaway notes, Article 26 is an exceptionally comprehensive prohibition of discrimination as it prohibits discrimination in general and not only with respect to ICCPR rights, see Hathaway, *The Rights of Refugees Under International Law* 125 and Human Rights Committee, 'CCPR General Comment No. 18: Non-discrimination' (10 November 1989), para 12. Concerning the status of non-nationals, see Human Rights Committee, 'CCPR General Comment No. 15: The Position of Aliens Under the Covenant' (11 April 1986). Although non-nationals can rely on Article 26, Hathaway has concluded based on the jurisprudence of the CCPR that the provision does not in practice guarantee equal treatment. See Hathaway, *The Rights of Refugees Under International Law* 128-147.

576 See eg *Chassagnou and others v France* [GC], App nos 25088/94, 28331/95, and 28443/95, 29 April 1999, para 89.

577 It has been noted that while the refusal to examine Article 14 complaints can be defended if the applicant clearly 'has tried every possible line of argument in the hope that at least one would succeed', in other cases, it is problematic for the development of case law (in addition to being problematic for the applicants). Dembour, *Who Believes in Human Rights? Reflections on the European Convention* 135; see also Timmer, 'Strengthening the Equality Analysis of the European Court of Human Rights: The Potential of the Concepts of Stereotyping and Vulnerability' 33.

Firstly, if the Court never clarifies the connection between best interests and non-discrimination (or ECHR articles other than Article 8), the jurisprudence develops unevenly. In some ECtHR cases analysed in this study, alleged discriminatory treatment of parents was collapsed into Article 8 because the discriminatory aspects were already examined under Article 8 and, according to the ECtHR, discrimination was not a dominant aspect of the case.[578] Secondly, if the best interests of the child are examined under Article 8 only, they can always be balanced.[579] This connects to the problem of balancing addressed in section 6.4. In general, it would be important for the ECtHR to further develop the criteria for choosing which ECHR article it considers a case under.[580]

The subject of migration also illustrates the limits of a legal response. These limits are visible in several aspects of this study; for instance, many measures recommended by the CRC Committee in the COs are of a non-legal nature, which illustrates the incompleteness of a strictly legal approach. As argued above, the prohibition of discrimination could be a powerful tool in tackling discrimination against non-nationals. Another matter is whether such political choices are made that take us even further from respecting the rights of non-nationals. The recent backlash towards human rights does not make it easier for treaty bodies who navigate the demands of states and the protection of human rights. The limits of what human rights law in general can achieve become particularly visible. However, I agree with Timmer that 'human rights should not be given up as a hopeless endeavor; on the contrary, human rights need to be strengthened – they need to be fought for'.[581]

Based on this thesis, several future research needs emerge. It is essential to conduct systematic studies that scrutinise different areas of law from the perspective of non-discrimination as well as to analyse the connection between best interests and non-discrimination. It would also be interesting to continue examining the procedural-structural trend in human rights practice and analyse it, for instance, from the perspective of access to justice. In this regard, it would

578 *RMS v Spain*, App no 28775/12, 18 June 2013; *Kocherov and Sergeyeva v Russia*, App no 16899/13, 29 March 2016. Overall, the ECtHR's view of what consists discrimination is narrow, as has been previously argued. See Rory O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR' (2009) 29 Legal Studies 211, 217; Timmer, 'Strengthening the Equality Analysis of the European Court of Human Rights: The Potential of the Concepts of Stereotyping and Vulnerability' 33-35.

579 Although it needs to be noted that the margin of appreciation plays a role in Article 14 cases, too; see eg *Konstantin Markin v Russia* [GC], App no 30078/06, 22 March 2012, para 126, where the ECtHR noted that there is a margin 'in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment'.

580 See eg O'Mahony, 'Child Protection and the ECHR: Making Sense of Procedural and Positive Obligations' 670-673, who notes that the ECtHR fluctuates between Articles 3 and 8 for no apparent reason in cases concerning protection of children from abuse and neglect.

581 Timmer, 'Strengthening the Equality Analysis of the European Court of Human Rights: The Potential of the Concepts of Stereotyping and Vulnerability' 54.

be important to analyse children's experiences: do the applicants experience the outcomes of the cases as fair? Concerning the ECtHR, future research is needed on whether the Court's approach varies depending on whether the child is an applicant or not. It would also be interesting to observe whether the ECtHR's use of the procedural approach displays distinguishable differences depending on the type of case. In addition, the role of public interest is an important question that merits further study beyond the standard arguments about immigration control.[582] Another important issue to be examined is the burden of proof and standard of proof from the perspective of possible variations between different fields of law. In Article II, I suggested applying a more applicant-friendly burden of proof in migrant cases.[583] The CRC Committee's stance in its individual communications jurisprudence towards the relationship between children's rights and immigration control is particularly interesting, and the CRC Committee's approach to expecting active measures from states is another important area to be studied. It would also be interesting to scrutinise the use of the best interests concept in strategic litigation: are the attempts to use the concept successful, and if yes, what kind of arguments have been presented?[584] In addition, Articles II and III brought forward two specific questions related to best interests and access to justice. The first, concerning the representation of children in the ECtHR, has recently been explored by Fenton-Glynn.[585] I am currently writing the second, which concerns the right moment to assess best interests in international proceedings that last for many years.

I sometimes play with the thought of what would happen if Article 3(1) was taken out of the CRC. Would it make a difference for children's enjoyment of their rights? Applicants would surely find other ways to feed children's rights into the reasoning. Courts would focus on other, more specific provisions that guarantee more or less the same rights and be forced to articulate the balancing of interests in more explicit terms, which would be a good development. At the same time, it is likely that there would be even less space for children's interests to be present in decision-making. From a strictly analytical perspective, the concept of the best interests of the child has many flaws. In practice, however, it has often proved

582 For example, it has been argued that in cases concerning the deportation of foreign national offenders with children, the importance of deportation is a constant and does not alter between individual cases. Instead, the ECtHR perceives it as reflecting underlying public policy goals; the severity of offending then varies from case to case. See Collinson, 'Reconstructing the European Court of Human Rights' Article 8 Jurisprudence in Deportation Cases: The Family's Right and the Public Interest' 354-355.

583 To this end, see the ongoing research project 'DISSECT: Evidence in International Human Rights Adjudication' <https://hrc.ugent.be/research/dissect-evidence-in-international-human-rights-adjudication/> accessed 21 January 2021.

584 See eg the climate case *Sacchi et al v Argentina et al* (Communication to the Committee on the Rights of the Child, 23 September 2019), which is currently pending before the CRC Committee.

585 Fenton-Glynn, 'Children, parents and the European Court of Human Rights'.

valuable. The ways in which the concept is – or is not – used in human rights practice make visible a variety of problems indicative of a larger whole, as this thesis has sought to illustrate.

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APPENDICES

Appendix I: Primary sources of Article II in descending chronological order

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Strand Lobben and others v Norway, App no 37283/13, 30 November 2017 (Chamber judgment)

Achim v Romania, App no 45959/11, 24 October 2017

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Barnea and Caldararu v Italy, App no 37931/15, 22 June 2017

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Jovanovic v Sweden, App no 10592/12, 22 October 2015

SH v Italy, App no 52557/14, 13 October 2015

NP v the Republic of Moldova, App no 58455/13, 6 October 2015

M and M v Croatia, App no 10161/13, 3 September 2015

Akinnibosun v Italy, App no 9056/14, 16 July 2015

T v the Czech Republic, App no 19315/11, 17 July 2014

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Mircea Dumitrescu v Romania, App no 14609/10, 30 July 2013

RMS v Spain, App no 28775/12, 18 June 2013

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AK and L v Croatia, App no 37956/11, 8 January 2013

RP and others v the United Kingdom, App no 38245/08, 9 October 2012

MD and others v Malta, App no 64791/10, 17 July 2012

KAB v Spain, App no 59819/08, 10 April 2012

Pontes v Portugal, App no 19554/09, 10 April 2012

Levin v Sweden, App no 35141/06, 15 March 2012

YC v the United Kingdom, App no 4547/10, 13 March 2012

Assunção Chaves v Portugal, App no 61226/08, 31 January 2012

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X v Croatia, App no 11223/04, 17 July 2008

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Salem v Denmark, App no 77036/11, 1 December 2016

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Kaplan and others v Norway, App no 32504/11, 24 July 2014

Senigo Longue and others v France, App no 19113/09, 10 July 2014

Tanda-Muzinga v France, App no 2260/10, 10 July 2014

Mugenzi v France, App no 52701/09, 10 July 2014

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Nunez v Norway, App no 55597/09, 28 June 2011

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APPENDIX II: PRIMARY SOURCES OF ARTICLE IV IN DESCENDING CHRONOLOGICAL ORDER

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Mozambique, CRC/C/MOZ/CO/3-4, 27 November 2019

Australia, CRC/C/AUS/CO/5-6, 1 November 2019

Republic of Korea, CRC/C/KOR/CO/5-6, 24 October 2019

Côte d'Ivoire, CRC/C/CIV/CO/2, 12 July 2019

Tonga, CRC/C/TON/CO/1, 2 July 2019

Cabo Verde, CRC/C/CPV/CO/2, 27 June 2019

Malta, CRC/C/MLT/CO/3-6, 26 June 2019

Botswana, CRC/C/BWA/CO/2-3, 26 June 2019

Singapore, CRC/C/SGP/CO/4-5, 31 May 2019

Syrian Arab Republic, CRC/C/SYR/CO/5, 6 March 2019

Japan, CRC/C/JPN/CO/4-5, 5 March 2019

Guinea, CRC/C/GIN/CO/3-6, 28 February 2019

Italy, CRC/C/ITA/CO/5-6, 28 February 2019

Belgium, CRC/C/BEL/CO/5-6, 28 February 2019

Bahrain, CRC/C/BHR/CO/4-6, 27 February 2019

El Salvador, CRC/C/SLV/CO/5-6, 29 November 2018

Mauritania, CRC/C/MRT/CO/3-5, 26 November 2018

Niger, CRC/C/NER/CO/3-5, 21 November 2018

Lao People's Democratic Republic, CRC/C/LAO/CO/3-6, 1 November 2018

Argentina, CRC/C/ARG/CO/5-6, 1 October 2018

Norway, CRC/C/NOR/CO/5-6, 4 July 2018

Angola, CRC/C/AGO/CO/5-7, 27 June 2018

Lesotho, CRC/C/LSO/CO/2, 25 June 2018

Montenegro, CRC/C/MNE/CO/2-3, 22 June 2018

Seychelles, CRC/C/SYC/CO/5-6, 5 March 2018

Spain, CRC/C/ESP/CO/5-6, 5 March 2018

Sri Lanka, CRC/C/LKA/CO/5-6, 2 March 2018

Panama, CRC/C/PAN/CO/5-6, 28 February 2018

Solomon Islands, CRC/C/SLB/CO/2-3, 28 February 2018

Palau, CRC/C/PLW/CO/2, 28 February 2018

Guatemala, CRC/C/GTM/CO/5-6, 28 February 2018

Marshall Islands, CRC/C/MHL/CO/3-4, 27 February 2018

Denmark, CRC/C/DNK/CO/5, 26 October 2017

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Republic of Moldova, CRC/MDA/CO/4-5, 20 October 2017

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Vanuatu, CRC/C/VUT/CO/2, 29 September 2017

Romania, CRC/C/ROU/CO/5, 13 July 2017

Mongolia, CRC/C/MNG/CO/5, 12 July 2017

Cameroon, CRC/C/CMR/CO/3-5, 6 July 2017

Bhutan, CRC/C/BTN/CO/3-5, 5 July 2017

Antigua and Barbuda, CRC/C/ATG/CO/2-4, 30 June 2017

Lebanon, CRC/C/LBN/CO/4-5, 22 June 2017

Qatar, CRC/C/QAT/CO/3-4, 22 June 2017

Saint Vincent and the Grenadines, CRC/C/VCT/CO/2-3, 13 March 2017

Georgia, CRC/C/GEO/CO/4, 9 March 2017

Central African Republic, CRC/C/CAF/CO/2, 8 March 2017

Estonia, CRC/C/EST/CO/2-4, 8 March 2017

Serbia, CRC/C/SRB/CO/2-3, 7 March 2017

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Barbados, CRC/C/BRB/CO/2, 3 March 2017

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Bulgaria, CRC/C/BGR/CO/3-5, 21 November 2016

Suriname, CRC/C/SUR/CO/3-4, 9 November 2016

Sierra Leone, CRC/C/SLE/CO/3-5, 1 November 2016

Nauru, CRC/C/NRU/CO/1, 28 October 2016

South Africa, CRC/C/ZAF/CO/2, 27 October 2016

Saudi Arabia, CRC/C/SAU/CO/3-4, 25 October 2016

New Zealand, CRC/C/NZL/CO/5, 21 October 2016

Slovakia, CRC/C/SVK/CO/3-5, 20 July 2016

Samoa, CRC/C/WSM/CO/2-4, 12 July 2016

United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/5, 12 July 2016

Pakistan, CRC/C/PAK/CO/5, 11 July 2016

Nepal, CRC/C/NPL/CO/3-5, 8 July 2016

Gabon, CRC/C/GAB/CO/2, 8 July 2016

Kenya, CRC/C/KEN/CO/3-5, 21 March 2016

Zambia, CRC/C/ZMB/CO/2-4, 14 March 2016

Oman, CRC/C/OMN/CO/3-4, 14 March 2016

Iran (Islamic Republic of), CRC/C/IRN/CO/3-4, 14 March 2016

Latvia, CRC/C/LVA/CO/3-5, 14 March 2016

Maldives, CRC/C/MDV/CO/4-5, 14 March 2016

Senegal, CRC/C/SEN/CO/3-5, 7 March 2016

Zimbabwe, CRC/C/ZWE/CO/2, 7 March 2016

Peru, CRC/C/PER/CO/4-5, 2 March 2016

Ireland, CRC/C/IRL/CO/3-4, 1 March 2016

Benin, CRC/C/BEN/CO/3-5, 25 February 2016

Brunei Darussalam, CRC/C/BRN/CO/2-3, 24 February 2016

Haiti, CRC/C/HTI/CO/2-3, 24 February 2016

France, CRC/C/FRA/CO/5, 23 February 2016

Bangladesh, CRC/C/BGD/CO/5, 30 October 2015

Timor-Leste, CRC/C/TLS/CO/2-3, 30 October 2015

Poland, CRC/C/POL/CO/3-4, 30 October 2015

United Arab Emirates, CRC/C/ARE/CO/2, 30 October 2015

Brazil, CRC/C/BRA/CO/2-4, 30 October 2015

Chile, CRC/C/CHL/CO/4-5, 30 October 2015

Kazakhstan, CRC/C/KAZ/CO/4, 30 October 2015

Netherlands, CRC/C/NLD/CO/4, 16 July 2015

Mexico, CRC/C/MEX/CO/4-5, 3 July 2015

Honduras, CRC/C/HND/CO/4-5, 3 July 2015

Eritrea, CRC/C/ERI/CO/4, 2 July 2015

Ghana, CRC/C/GHA/CO/3-5, 9 June 2015

Ethiopia, CRC/C/ETH/CO/4-5, 3 June 2015

Jamaica, CRC/C/JAM/CO/3-4, 10 March 2015

Turkmenistan, CRC/C/TKM/CO/2-4, 10 March 2015

Sweden, CRC/C/SWE/CO/5, 6 March 2015

Colombia, CRC/C/COL/CO/4-5, 6 March 2015

Dominican Republic, CRC/C/DOM/CO/3-5, 6 March 2015

Uruguay, CRC/C/URY/CO/3-5, 5 March 2015

United Republic of Tanzania, CRC/C/TZA/CO/3-5, 3 March 2015

Iraq, CRC/C/IRQ/CO/2-4, 3 March 2015

Mauritius, CRC/C/MUS/CO/3-5, 27 February 2015

Switzerland, CRC/C/CHE/CO/2-4, 26 February 2015

Gambia, CRC/C/GMB/CO/2-3, 20 February 2015

Hungary, CRC/C/HUN/CO/3-5, 14 October 2014

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Venezuela (Bolivarian Republic of), CRC/C/VEN/CO/3-5, 13 October 2014

Indonesia, CRC/C/IDN/CO/3-4, 10 July 2014

Jordan, CRC/C/JOR/CO/4-5, 8 July 2014

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Holy See, CRC/C/VAT/CO/2, 25 February 2014

Portugal, CRC/C/PRT/CO/3-4, 25 February 2014

Germany, CRC/C/DEU/CO/3-4, 25 February 2014

Russian Federation, CRC/C/RUS/CO/4-5, 25 February 2014

Yemen, CRC/C/YEM/CO/4, 25 February 2014

Congo, CRC/C/COG/CO/2-4, 25 February 2014

Tuvalu, CRC/C/TUV/CO/1, 30 October 2013

Lithuania, CRC/C/LTU/CO/3-4, 30 October 2013

Luxembourg, CRC/C/LUX/CO/3-4, 29 October 2013

Monaco, CRC/C/MCO/CO/2-3, 29 October 2013

Sao Tome and Principe, CRC/C/STP/CO/2-4, 29 October 2013

China, CRC/C/CHN/CO/3-4, 29 October 2013

China (Hong Kong), CRC/C/CHN/CO/3-4, 29 October 2013

China (Macau), CRC/C/CHN/CO/3-4, 29 October 2013

Kuwait, CRC/C/KWT/CO/2, 29 October 2013

Uzbekistan, CRC/C/UZB/CO/3-4, 10 July 2013

Rwanda, CRC/C/RWA/CO/3-4, 8 July 2013

Slovenia, CRC/C/SVN/CO/3-4, 8 July 2013

Armenia, CRC/C/ARM/CO/3-4, 8 July 2013

Guinea-Bissau, CRC/C/GNB/CO/2-4, 8 July 2013

Israel, CRC/C/ISR/CO/2-4, 4 July 2013

Niue, CRC/C/NIU/CO/1, 26 June 2013

Malta, CRC/C/MLT/CO/2, 18 June 2013

Guyana, CRC/C/GUY/CO/2-4, 18 June 2013

Guinea, CRC/C/GIN/CO/2, 13 June 2013

Liberia, CRC/C/LBR/CO/2-4, 13 December 2012

Albania, CRC/C/ALB/CO/2-4, 7 December 2012

Canada, CRC/C/CAN/CO/3-4, 6 December 2012

Austria, CRC/C/AUT/CO/3-4, 3 December 2012

Andorra, CRC/C/AND/CO/2, 3 December 2012

Bosnia and Herzegovina, CRC/C/BIH/CO/2-4, 29 November 2012

Namibia, CRC/C/NAM/CO/2-3, 16 October 2012

Cyprus, CRC/C/CYP/CO/3-4, 24 September 2012

Australia, CRC/C/AUS/CO/4, 28 August 2012

Viet Nam, CRC/C/VNM/CO/3-4, 22 August 2012

Greece, CRC/C/GRC/CO/2-3, 13 August 2012

Turkey, CRC/C/TUR/CO/2-3, 20 July 2012

Algeria, CRC/C/DZA/CO/3-4, 18 July 2012

Myanmar, CRC/C/MMR/CO/3-4, 14 March 2012

Azerbaijan, CRC/C/AZE/CO/3-4, 12 March 2012

Madagascar, CRC/C/MDG/CO/3-4, 8 March 2012

Togo, CRC/C/TGO/CO/3-4, 8 March 2012

Cook Islands, CRC/C/COK/CO/1, 22 February 2012

Thailand, CRC/C/THA/CO/3-4, 17 February 2012

Syrian Arab Republic, CRC/C/SYR/CO/3-4, 9 February 2012

Republic of Korea, CRC/C/KOR/CO/3-4, 2 February 2012

Seychelles, CRC/C/SYC/CO/2-4, 23 January 2012

Iceland, CRC/C/ISL/CO/3-4, 23 January 2012

Panama, CRC/C/PAN/CO/3-4, 21 December 2011

Italy, CRC/C/ITA/CO/3-4, 31 October 2011

Czech Republic, CRC/C/CZE/CO/3-4, 4 August 2011

Bahrain, CRC/C/BHR/CO/2-3, 3 August 2011

Cambodia, CRC/C/KHM/CO/2, 3 August 2011

Costa Rica, CRC/C/CRI/CO/4, 3 August 2011

Cuba, CRC/C/CUB/CO/2, 3 August 2011

Finland, CRC/C/FIN/CO/4, 3 August 2011

Egypt, CRC/C/EGY/CO/3-4, 15 July 2011

Singapore, CRC/C/SGP/CO/2-3, 4 May 2011

Ukraine, CRC/C/UKR/CO/3-4, 21 April 2011

New Zealand, CRC/C/NZL/CO/3-4, 11 April 2011

Lao People's Democratic Republic, CRC/C/LAO/CO/2, 8 April 2011

Belarus, CRC/C/BLR/CO/3-4, 8 April 2011

Afghanistan, CRC/C/AFG/CO/1, 8 April 2011

Denmark, CRC/C/DNK/CO/4, 7 April 2011

Spain, CRC/C/ESP/CO/3-4, 3 November 2010

Guatemala, CRC/C/GTM/CO/3-4, 25 October 2010

Sudan, CRC/C/SDN/CO/3-4, 22 October 2010

Montenegro, CRC/C/MNE/CO/1, 21 October 2010

Nicaragua, CRC/C/NIC/CO/4, 20 October 2010

Angola, CRC/C/AGO/CO/2-4, 19 October 2010

Burundi, CRC/C/BDI/CO/2, 19 October 2010

Sri Lanka, CRC/C/LKA/CO/3-4, 19 October 2010

North Macedonia, CRC/C/MKD/CO/2, 23 June 2010

Grenada, CRC/C/GRD/CO/2, 22 June 2010

Argentina, CRC/C/ARG/CO/3-4, 21 June 2010

Nigeria, CRC/C/NGA/CO/3-4, 21 June 2010

Japan, CRC/C/JPN/CO/3, 20 June 2010

Belgium, CRC/C/BEL/CO/3-4, 18 June 2010

Tunisia, CRC/C/TUN/CO/3, 16 June 2010

Mongolia, CRC/C/MNG/CO/3-4, 4 March 2010

Norway, CRC/C/NOR/CO/4, 3 March 2010

Ecuador, CRC/C/ECU/CO/4, 2 March 2010

Cameroon, CRC/C/CMR/CO/2, 18 February 2010

El Salvador, CRC/C/SLV/CO/3-4, 17 February 2010

Paraguay, CRC/C/PRY/CO/3, 10 February 2010

Burkina Faso, CRC/C/BFA/CO/3-4, 9 February 2010

Tajikistan, CRC/C/TJK/CO/2, 5 February 2010

Mozambique, CRC/C/MOZ/CO/2, 4 November 2009

Philippines, CRC/C/PHL/CO/3-4, 22 October 2009

Bolivia (Plurinational State of), CRC/C/BOL/CO/4, 16 October 2009

Pakistan, CRC/C/PAK/CO/3-4, 15 October 2009

Qatar, CRC/C/QAT/CO/2, 14 October 2009

Romania, CRC/C/ROM/CO/4, 30 June 2009

Sweden, CRC/C/SWE/CO/4, 26 June 2009

Bangladesh, CRC/C/BGD/CO/4, 26 June 2009

France, CRC/C/FRA/CO/4, 22 June 2009

Niger, CRC/C/NER/CO/2, 18 June 2009

Mauritania, CRC/C/MRT/CO/2, 17 June 2009

Netherlands (Antilles), CRC/C/NLD/CO/3, 27 March 2009

Netherlands (Aruba), CRC/C/NLD/CO/3, 27 March 2009

Netherlands, CRC/C/NLD/CO/3, 27 March 2009

Malawi, CRC/C/MWI/CO/2, 27 March 2009

Democratic People's Republic of Korea, CRC/C/PRK/CO/4, 27 March 2009

Republic of Moldova, CRC/C/MDA/CO/3, 20 February 2009

Chad, CRC/C/TCD/CO/2, 12 February 2009

Democratic Republic of the Congo, CRC/C/COD/CO/2, 10 February 2009

United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/4, 20 October 2008

Bhutan, CRC/C/BTN/CO/2, 8 October 2008

Djibouti, CRC/C/DJI/CO/2, 7 October 2008

Eritrea, CRC/C/ERI/CO/3, 23 June 2008

Georgia, CRC/C/GEO/CO/3, 23 June 2008

Bulgaria, CRC/C/BGR/CO/2, 23 June 2008

Sierra Leone, CRC/C/SLE/CO/2, 20 June 2008

Serbia, CRC/C/SRB/CO/1, 20 June 2008

Timor-Leste, CRC/C/TLS/CO/1, 14 February 2008

Dominican Republic, CRC/C/DOM/CO/2, 11 February 2008

Marshall Islands, CRC/C/MHL/CO/2, 19 November 2007

Venezuela (Bolivarian Republic of), CRC/C/VEN/CO/2, 17 October 2007

Maldives, CRC/C/MDV/CO/3, 13 July 2007

Slovakia, CRC/C/SVK/CO/2, 10 July 2007

Uruguay, CRC/C/URY/CO/2, 5 July 2007

Malaysia, CRC/C/MYS/CO/1, 25 June 2007

Kenya, CRC/C/KEN/CO/2, 19 June 2007

Kazakhstan, CRC/C/KAZ/CO/3, 19 June 2007

Suriname, CRC/C/SUR/CO/2, 18 June 2007

Mali, CRC/C/MLI/CO/2, 3 May 2007

Honduras, CRC/C/HND/CO/3, 3 May 2007

Chile, CRC/C/CHL/CO/3, 23 April 2007

Ethiopia, CRC/C/ETH/CO/3, 1 November 2006

Senegal, CRC/C/SEN/CO/2, 20 October 2006

Congo, CRC/C/COG/CO/1, 20 October 2006

Benin, CRC/C/BEN/CO/2, 20 October 2006

Samoa, CRC/C/WSM/CO/1, 16 October 2006

Eswatini, CRC/C/SWZ/CO/1, 16 October 2006

Kiribati, CRC/C/KIR/CO/1, 29 September 2006

Oman, CRC/C/OMN/CO/2, 29 September 2006

Jordan, CRC/C/JOR/CO/3, 29 September 2006

Ireland, CRC/C/IRL/CO/2, 29 September 2006

Latvia, CRC/C/LVA/CO/2, 28 June 2006

United Republic of Tanzania, CRC/C/TZA/CO/2, 21 Jun 2006

Lebanon, CRC/C/LBN/CO/3, 8 June 2006

Mexico, CRC/C/MEX/CO/3, 8 June 2006

Colombia, CRC/C/COL/CO/3, 8 June 2006

Uzbekistan, CRC/C/UZB/CO/2, 2 June 2006

Turkmenistan, CRC/C/TKM/CO/1, 2 June 2006

Lithuania, CRC/C/LTU/CO/2, 17 March 2006

Hungary, CRC/C/HUN/CO/2, 17 March 2006

Mauritius, CRC/C/MUS/CO/2, 17 March 2006

Ghana, CRC/C/GHA/CO/2, 17 March 2006

Azerbaijan, CRC/C/AZE/CO/2, 17 March 2006

Trinidad and Tobago, CRC/C/TTO/CO/2, 17 March 2006

Thailand, CRC/C/THA/CO/2, 17 March 2006

Saudi Arabia, CRC/C/SAU/CO/2, 17 March 2006

Liechtenstein, CRC/C/LIE/CO/2, 16 March 2006

Peru, CRC/C/PER/CO/3, 14 March 2006

China, CRC/C/CHN/CO/2, 24 November 2005

China (Macau), CRC/C/CHN/CO/2, 24 November 2005

China (Hong Kong), CRC/C/CHN/CO/2, 24 November 2005

Uganda, CRC/C/UGA/CO/2, 23 November 2005

Russian Federation, CRC/C/RUS/CO/3, 23 November 2005

Denmark, CRC/C/DNK/CO/3, 23 November 2005

Finland, CRC/C/15/Add.272, 20 October 2005

Australia, CRC/C/15/Add.268, 20 October 2005

Algeria, CRC/C/15/Add.269, 12 October 2005

Bosnia and Herzegovina, CRC/C/15/Add.260, 21 September 2005

Costa Rica, CRC/C/15/Add.266, 21 September 2005

Philippines, CRC/C/15/Add.259, 21 September 2005

Norway, CRC/C/15/Add.263, 21 September 2005

Nicaragua, CRC/C/15/Add.265, 21 September 2005

Mongolia, CRC/C/15/Add.264, 21 September 2005

Nepal, CRC/C/15/Add.261, 21 September 2005

Yemen, CRC/C/15/Add.267, 21 September 2005

Saint Lucia, CRC/C/15/Add.258, 21 September 2005

Ecuador, CRC/C/15/Add.262, 13 September 2005

Nigeria, CRC/C/15/Add.257, 13 April 2005

Iran (Islamic Republic of), CRC/C/15/Add.254, 31 March 2005

Luxembourg, CRC/C/15/Add.250, 31 March 2005

Albania, CRC/C/15/Add.249, 31 March 2005

Austria, CRC/C/15/Add.251, 31 March 2005

Bahamas, CRC/C/15/Add.253, 31 March 2005

Belize, CRC/C/15/Add.252, 31 March 2005

Togo, CRC/C/15/Add.255, 31 March 2005

Sweden, CRC/C/15/Add.248, 30 March 2005

Bolivia (Plurinational State of), CRC/C/15/Add.256, 11 February 2005

Morocco, CRC/C/15/RESP/Add.211 (PART I), 1 December 2004

Botswana, CRC/C/15/Add.242, 3 November 2004

Brazil, CRC/C/15/Add.241, 3 November 2004

Antigua and Barbuda, CRC/C/15/Add.247, 3 November 2004

Angola, CRC/C/15/Add.246, 3 November 2004

Croatia, CRC/C/15/Add.243, 3 November 2004

Equatorial Guinea, CRC/C/15/Add.245, 3 November 2004

Kyrgyzstan, CRC/C/15/Add.244, 3 November 2004

Liberia, CRC/C/15/Add.236, 1 July 2004

Democratic People's Republic of Korea, CRC/C/15/Add.239, 1 July 2004

Rwanda, CRC/C/15/Add.234, 1 July 2004

Sao Tome and Principe, CRC/C/15/Add.235, 1 July 2004

Dominica, CRC/C/15/Add.238, 30 June 2004

El Salvador, CRC/C/15/Add.232, 30 June 2004

France, CRC/C/15/Add.240, 30 June 2004

Panama, CRC/C/15/Add.233, 30 June 2004

Myanmar, CRC/C/15/Add.237, 30 June 2004

Netherlands, CRC/C/15/Add.227, 26 February 2004

Papua New Guinea, CRC/C/15/Add.229, 26 February 2004

Indonesia, CRC/C/15/Add.223, 26 February 2004

Japan, CRC/C/15/Add.231, 26 February 2004

India, CRC/C/15/Add.228, 26 February 2004

Guyana, CRC/C/15/Add.224, 26 February 2004

Germany, CRC/C/15/Add.226, 26 February 2004

Armenia, CRC/C/15/Add.225, 26 February 2004

Slovenia, CRC/C/15/Add.230, 26 February 2004

Netherlands (Aruba), CRC/C/15/Add.227, 26 February 2004

Singapore, CRC/C/15/Add.220, 27 October 2003

San Marino, CRC/C/15/Add.214, 27 October 2003

Bangladesh, CRC/C/15/Add.221, 27 October 2003

Brunei Darussalam, CRC/C/15/Add.219, 27 October 2003

Canada, CRC/C/15/Add.215, 27 October 2003

Georgia, CRC/C/15/Add.222, 27 October 2003

Madagascar, CRC/C/15/Add.218, 27 October 2003

Pakistan, CRC/C/15/Add.217, 27 October 2003

New Zealand, CRC/C/15/Add.216, 27 October 2003

Kazakhstan, CRC/C/15/Add.213, 10 July 2003

Morocco, CRC/C/15/Add.211, 10 July 2003

Syrian Arab Republic, CRC/C/15/Add.212, 10 July 2003

Libya, CRC/C/15/Add.209, 4 July 2003

Jamaica, CRC/C/15/Add.210, 4 July 2003

Eritrea, CRC/C/15/Add.204, 2 July 2003

Cyprus, CRC/C/15Add.205, 2 July 2003

Solomon Islands, CRC/C/15/Add.208, 2 July 2003

Sri Lanka, CRC/C/15/Add.207, 2 July 2003

Zambia, CRC/C/15/Add.206, 2 July 2003

Cyprus, CRC/C/15/Add.205, 2 July 2003

Italy, CRC/C/15/Add.198, 18 March 2003

Haiti, CRC/C/15/Add.202, 18 March 2003

Czech Republic, CRC/C/15/Add.201, 18 March 2003

Viet Nam, CRC/C/15/Add.200, 18 March 2003

Romania, CRC/C/15/Add.199, 18 March 2003

Republic of Korea, CRC/C/15/Add.197, 18 March 2003

Estonia, CRC/C/15/Add.196, 17 March 2003

Iceland, CRC/C/15/Add.203, 31 January 2003

Republic of Moldova, CRC/C/15/Add.192, 31 October 2002

Poland, CRC/C/15/Add.194, 30 October 2002

Israel, CRC/C/15/Add.195, 9 October 2002

Burkina Faso, CRC/C/15/Add.193, 9 October 2002

Argentina, CRC/C/15/Add.187, 9 October 2002

Seychelles, CRC/C/15/Add.189, 9 October 2002

Sudan, CRC/C/15/Add.190, 9 October 2002

Ukraine, CRC/C/15/Add.191, 9 October 2002

United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.188, 9 October 2002

United Arab Emirates, CRC/C/15/Add.183, 13 June 2002

Tunisia, CRC/C/15/Add.181, 13 June 2002

Spain, CRC/C/15/Add.185, 13 June 2002

Switzerland, CRC/C/15/Add.182, 13 June 2002

Saint Vincent and the Grenadines, CRC/C/15/Add.184, 13 June 2002

Belarus, CRC/C/15/Add.180, 13 June 2002

Belgium, CRC/C/15/Add.178, 13 June 2002

Guinea-Bissau, CRC/C/15/Add.177, 13 June 2002

Niger, CRC/C/15/Add.179, 13 June 2002

Netherlands (Antilles), CRC/C/15/Add.186, 13 June 2002

Mozambique, CRC/C/15/Add.172, 3 April 2002

Chile, CRC/C/15/Add.173, 3 April 2002

Gabon, CRC/C/15/Add.171, 3 April 2002

Greece, CRC/C/15/Add.170, 2 April 2002

Malawi, CRC/C/15/Add.174, 2 April 2002

Lebanon, CRC/C/15/Add.169, 21 March 2002

Bahrain, CRC/C/15/Add.175, 11 March 2002

Andorra, CRC/C/15/Add.176, 11 March 2002

Cabo Verde, CRC/C/15/Add.168, 7 November 2001

Kenya, CRC/C/15/Add.160, 7 November 2001

Uzbekistan, CRC/C/15/Add.167, 7 November 2001

Mauritania, CRC/C/15/Add.159, 6 November 2001

Oman, CRC/C/15/Add.161, 6 November 2001

Portugal, CRC/C/15/Add.162, 6 November 2001

Qatar, CRC/C/15/Add.163, 6 November 2001

Paraguay, CRC/C/15/Add.166, 6 November 2001

Cameroon, CRC/C/15/Add.164, 6 November 2001

Gambia, CRC/C/15/Add.165, 6 November 2001

Denmark, CRC/C/15/Add.151, 10 July 2001

Democratic Republic of the Congo, CRC/C/15/Add.153, 9 July 2001

Côte d'Ivoire, CRC/C/15/Add.155, 9 July 2001

Bhutan, CRC/C/15/Add.157, 9 July 2001

Monaco, CRC/C/15/Add.158, 9 July 2001

Guatemala, CRC/C/15/Add.154, 9 July 2001

United Republic of Tanzania, CRC/C/15/Add.156, 9 July 2001

Turkey, CRC/C/15/Add.152, 9 July 2001

Liechtenstein, CRC/C/15/Add.143, 23 February 2001

Lithuania, CRC/C/15/Add.146, 21 February 2001

Lesotho, CRC/C/15/Add.147, 21 February 2001

Latvia, CRC/C/15/Add.142, 21 February 2001

Palau, CRC/C/15/Add.149, 21 February 2001

Dominican Republic, CRC/C/15/Add.150, 21 February 2001

Egypt, CRC/C/15/Add.145, 21 February 2001

Ethiopia, CRC/C/15/Add.144, 21 February 2001

Saudi Arabia, CRC/C/15/Add.148, 21 February 2001

Marshall Islands, CRC/C/15/Add.139, 26 October 2000

Comoros, CRC/C/15/Add.141, 23 October 2000

Slovakia, CRC/C/15/Add.140, 23 October 2000

Tajikistan, CRC/C/15/Add.136, 23 October 2000

Central African Republic, CRC/C/15/Add.138, 18 October 2000

Burundi, CRC/C/15/Add.133, 16 October 2000

Colombia, CRC/C/15/Add.137, 16 October 2000

Finland, CRC/C/15/Add.132, 16 October 2000

United Kingdom of Great Britain and Northern Ireland (Crown Dependencies), CRC/C/15/Add.134, 16 October 2000

United Kingdom of Great Britain and Northern Ireland (Crown Dependencies), CRC/C/15/Add.135, 16 October 2000

United Kingdom of Great Britain and Northern Ireland (Overseas Territory), CRC/C/15/Add.135, 16 October 2000

Kyrgyzstan, CRC/C/15/Add.127, 9 August 2000

Jordan, CRC/C/15/Add.125, 28 June 2000

Malta, CRC/C/15/Add.129, 28 June 2000

Norway, CRC/C/15/Add.126, 28 June 2000

Georgia, CRC/C/15/Add.124, 28 June 2000

Djibouti, CRC/C/15/Add.131, 28 June 2000

Cambodia, CRC/C/15/Add.128, 28 June 2000

Iran (Islamic Republic of), CRC/C/15/Add.123, 28 June 2000

Suriname, CRC/C/15/Add.130, 28 June 2000

Grenada, CRC/C/15/Add.121, 28 February 2000

Costa Rica, CRC/C/15/Add.117, 24 February 2000

Armenia, CRC/C/15/Add.119, 24 February 2000

Sierra Leone, CRC/C/15/Add.116, 24 February 2000

North Macedonia, CRC/C/15/Add.118, 23 February 2000

India, CRC/C/15/Add.115, 23 February 2000

Peru, CRC/C/15/Add.120, 22 February 2000

South Africa, CRC/C/15/Add.122, 22 February 2000

Russian Federation, CRC/C/15/Add.110, 10 November 1999

Vanuatu, CRC/C/15/Add.111, 10 November 1999

Mexico, CRC/C/15/Add.112, 10 November 1999

Mali, CRC/C/15/Add.113, 2 November 1999

Venezuela (Bolivarian Republic of), CRC/C/15/Add.109, 2 November 1999

Netherlands, CRC/C/15/Add.114, 26 October 1999

Nicaragua, CRC/C/15/Add.108, 24 August 1999

Honduras, CRC/C/15/Add.105, 24 August 1999

Barbados, CRC/C/15/Add.103, 24 August 1999

Chad, CRC/C/15/Add.107, 24 August 1999

Saint Kitts and Nevis, CRC/C/15/Add.104, 24 August 1999

Benin, CRC/C/15/Add.106, 12 August 1999

Belize, CRC/C/15/Add.99, 10 May 1999

Guinea, CRC/C/15/Add.100, 10 May 1999

Sweden, CRC/C/15/Add.101, 10 May 1999

Yemen, CRC/C/15/Add.102, 10 May 1999

Austria, CRC/C/15/Add.98, 7 May 1999

Bolivia (Plurinational State of), CRC/C/15/Add.95, 26 October 1998

Ecuador, CRC/C/15/Add.93, 26 October 1998

Iraq, CRC/C/15/Add.94, 26 October 1998

Kuwait, CRC/C/15/Add.96, 26 October 1998

Thailand, CRC/C/15/Add.97, 26 October 1998

Maldives, CRC/C/15/Add.91, 24 June 1998

Luxembourg, CRC/C/15/Add.92, 24 June 1998

Japan, CRC/C/15/Add.90, 24 June 1998

Hungary, CRC/C/15/Add.87, 24 June 1998

Democratic People's Republic of Korea, CRC/C/15/Add.88, 24 June 1998

Fiji, CRC/C/15/Add.89, 24 June 1998

Ireland, CRC/C/15/Add.85, 4 February 1998

Micronesia (Federated States of), CRC/C/15/Add.85, 4 February 1998

Libya, CRC/C/15/Add.84, 4 February 1998

Micronesia (Federated States of), CRC/C/15/Add.86, 4 February 1998

Togo, CRC/C/15/Add.83, 21 October 1997

Trinidad and Tobago, CRC/C/15/Add.82, 21 October 1997

Uganda, CRC/C/15/Add.80, 21 October 1997

Lao People's Democratic Republic, CRC/C/15/Add.78, 21 October 1997

Czech Republic, CRC/C/15/Add.81, 21 October 1997

Australia, CRC/C/15/Add.79, 21 October 1997

Azerbaijan, CRC/C/15/Add.77, 18 June 1997

Algeria, CRC/C/15/Add.76, 18 June 1997

Bangladesh, CRC/C/15/Add.74, 18 June 1997

Cuba, CRC/C/15/Add.72, 18 June 1997

Ghana, CRC/C/15/Add.73, 18 June 1997

Honduras, CRC/C/15/Add.75, 18 June 1997

Syrian Arab Republic, CRC/C/15/Add.70, 24 January 1997

Ethiopia, CRC/C/15/Add.67, 24 January 1997

Bulgaria, CRC/C/15/Add.66, 24 January 1997

Myanmar, CRC/C/15/Add.69, 24 January 1997

New Zealand, CRC/C/15/Add.71, 24 January 1997

Panama, CRC/C/15/Add.68, 24 January 1997

Nigeria, CRC/C/15/Add.61, 30 October 1996

Morocco, CRC/C/15/Add.60, 30 October 1996

Mauritius, CRC/C/15/Add.64, 30 October 1996

Slovenia, CRC/C/15/Add.65, 30 October 1996

United Kingdom of Great Britain and Northern Ireland (Hong Kong), CRC/C/15/Add.63, 30 October 1996

Uruguay, CRC/C/15/Add.62, 11 October 1996

Zimbabwe, CRC/C/15/Add.55, 7 June 1996

Nepal, CRC/C/15/Add.57, 7 June 1996

Lebanon, CRC/C/15/Add.54, 7 June 1996

China, CRC/C/15/Add.56, 7 June 1996

Guatemala, CRC/C/15/Add.58, 7 June 1996

Cyprus, CRC/C/15/Add.59, 7 June 1996

Croatia, CRC/C/15/Add.52, 13 February 1996

Finland, CRC/C/15/Add.53, 13 February 1996

Iceland, CRC/C/15/Add.50, 13 February 1996

Mongolia, CRC/C/15/Add.48, 13 February 1996

Republic of Korea, CRC/C/15/Add.51, 13 February 1996

Yemen, CRC/C/15/Add.47, 13 February 1996

Yugoslavia, CRC/C/15/Add.49, 13 February 1996

Senegal, CRC/C/15/Add.44, 27 November 1995

Ukraine, CRC/C/15/Add.42, 27 November 1995

Portugal, CRC/C/15/Add.45, 27 November 1995

Holy See, CRC/C/15/Add.46, 27 November 1995

Italy, CRC/C/15/Add.41, 27 November 1995

Germany, CRC/C/15/Add.43, 27 November 1995

Tunisia, CRC/C/15/Add.39, 21 June 1995

Sri Lanka, CRC/C/15/Add.40, 21 June 1995

Canada, CRC/C/15/Add.37, 20 June 1995

Belgium, CRC/C/15/Add.38, 20 June 1995

Nicaragua, CRC/C/15/Add.36, 20 June 1995

Philippines, CRC/C/15/Add.29, 15 February 1995

Jamaica, CRC/C/15/Add.32, 15 February 1995

Argentina, CRC/C/15/Add.35, 15 February 1995

Colombia, CRC/C/15/Add.30, 15 February 1995

Denmark, CRC/C/15/Add.33, 15 February 1995

United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.34, 15 February 1995

Poland, CRC/C/15/Add.31, 15 January 1995

Paraguay, CRC/C/15/Add.27, 24 October 1994

Indonesia, CRC/C/15/Add.25, 24 October 1994

Honduras, CRC/C/15/Add.24, 24 October 1994

Spain, CRC/C/15/Add.28, 24 October 1994

Madagascar, CRC/C/15/Add.26, 14 October 1994

Jordan, CRC/C/15/Add.21, 25 April 1994

Norway, CRC/C/15/Add.23, 25 April 1994

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'In All Actions Concerning Children'?

Best Interests of the Child in the Case Law of the Supreme Administrative Court of Finland

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Abstract

Best interests of the child safeguarded by Article 3(1) of the Convention on the Rights of the Child (CRC) have to be a primary consideration in all actions concerning children. This article evaluates implementation of Article 3(1) in practice by analysing recent jurisprudence of the Supreme Administrative Court of Finland. Results of the study indicate differences between case groups in considering and referring to best interests; the Supreme Administrative Court has considered best interests regularly in cases concerning aliens and child welfare, sometimes in cases related to primary education and reimbursements, and never in cases related to environmental permits. The meaning of the best interests of the child varies between case groups, and the connection to human rights often remains unclear. Best interests have been referred to more often when they have been mentioned in the applicable law or its preparatory works. The results support including a comprehensive reference to the best interests in national laws.

Keywords

children's rights – best interests – Article 3(1) – Convention on the Rights of the Child – systematic case studies – Finland – implementation of rights in practice – aliens – child welfare

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1 Introduction

The important role of children's best interests in all cases concerning children is well assured – at least in theory. Article 3(1) of the United Nations Convention on the Rights of the Child (CRC) offers the key formulation of the principle:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 3(1) is one of the most important provisions of the CRC, and its significance has been widely acknowledged (Hammarberg 1990, Zermatten 2010). The United Nations Committee on the Rights of the Child has even elevated Article 3(1) as one of the general principles guiding the interpretation of the Convention (Committee on the Rights of the Child, 1991 and 2013a). Article 3(1) is binding on its States Parties, as is the CRC as a whole.

The best interests concept is not in itself a novelty. The CRC, however, made it a new principle of interpretation in international law (Freeman, 2007) and brought about two major changes to the concept. The first change is related to the connection between best interests and human rights. The Committee on the Rights of the Child has suggested that human rights of children be the starting point of assessing children's best interests: implementation of best interests requires implementation of relevant rights. As there is no hierarchy of rights in the CRC, all the rights provided for are in the child's best interests, and best interests cannot be used as an excuse for violating those rights (Committee on the Rights of the Child, 2013a). The second significant change is that the CRC considerably broadened the sphere of actions in which best interests have to be considered. Best interests now have to be a primary consideration in *all* cases concerning children, not just in cases traditionally associated with children (Committee on the Rights of the Child, 2013a).

Even though the CRC is an international convention, an efficient enjoyment of rights safeguarded by it requires implementation on the national level. Both the inclusion in the national legislation and application in national courts are important (Sandberg, 2014). It is not enough that best interests be respected by the legislator; national courts handling cases concerning children must ensure that the requirements of Article 3(1) are met. Considering best interests in individual cases is essential since the concept cannot be given a fixed meaning (Committee on the Rights of the Child, 2013a).

The focus of this article is considering best interests in individual cases. By systematically analysing case law, the study presented in the article looks at the implementation of best interests in the case law of the Supreme Administrative Court of Finland. Has the Supreme Administrative Court considered the best interests of the child in its judgments concerning children between 2001 and 2014 in the way required by Article 3(1): putting best interests as a primary consideration in all cases concerning children and paying attention to the relevant human rights of children?

The CRC was incorporated into Finnish law on 20 August 1991[1] and it is now directly applicable in Finnish courts of law. Before the CRC entered into force in Finland, the best interests concept was understood in a more narrow way and applied mostly in family law matters such as divorce, custody and adoption cases (Hakalehto-Wainio, 2013). According to the first periodic report of Finland to the Committee on the Rights of the Child, at the time of the adoption of the CRC, national legislation was considered to guarantee children's rights quite well (Committee on the Rights of the Child, 1995). However, there seems to be a real concern of the best interests principle not being applied well enough in practice. The Committee on the Rights of the Child stated in its latest concluding observations to Finland that the best interests principle had not been adequately understood or taken into account in decisions affecting children. The Committee likewise pointed out the need to ensure the principle is integrated and applied in legislative, administrative and judicial proceedings as well as policies, programmes and projects relevant to and with an impact on children, and that the legal rationale for all judicial and administrative judgments and decisions should be based on the best interests of the child (Committee on the Rights of the Child, 2011).

The article first introduces the structure of Article 3(1) and the Finnish legal system in brief. It then proceeds to presenting the study, which aims at finding answers to the following questions. Have best interests been referred to in the decisions of the Supreme Administrative Court and, if yes, have they been genuinely considered? Quantitative analysis is followed by a closer look at each case type. Can differences between case types be found? Have the best interests of the child been understood differently in different contexts? What can be said about the role of Article 3(1)?

1 In Finnish, *Asetus lapsen oikeuksia koskevan yleissopimuksen voimaansaattamisesta sekä yleissopimuksen eräiden määräysten hyväksymisestä annetun lain voimaantulosta*, 21.08.1991/60.

2 Article 3(1): The Expression of a Comprehensive Human Rights Standard

The best interests of the child is one of the most debated and criticised concepts of the CRC. It is not hard to see why; the wording of Article 3(1) lacks concrete guidance to decision-makers, and there are many ways of interpreting the concept. Indeterminacy is, however, typical of human rights obligations in general. Article 3(1) has been blamed of undermining the rights enshrined in the CRC: why should we talk about children's *interests* when children have *rights* instead? Furthermore, Article 3(1) has been accused of paternalism and overtrumping children's views (Cantwell, 2011). Perhaps as a reaction to this critique, the Committee on the Rights of the Child emphasised in its General Comment No. 14 the connection between Articles 3 on the best interests and 12 on the child's views, and expressed clearly that an adequate best interests assessment requires that the child's views be paid attention to. (Committee on the Rights of the Child, 2013a). Zermatten has pointed out that the protective approach of Article 3 and the participative approach of Article 12 do not necessarily collide (Zermatten, 2010), and the Committee on the Rights of the Child has underlined that the two articles are complementary and serve the same purpose (Committee on the Rights of the Child, 2009). However, there is no general rule as to how much weight should be accorded to the child's views, as well as when children's views should be a determining factor instead of the views of adults.

The principle of the best interests of the child applies to "all actions". An "action" is understood in a broad way: the Committee on the Rights of the Child has stated that actions include not only active measures but also omissions. "Concerning" is an essential term for the study presented in this article, since it was important to include all cases that concern children in the sense of Article 3(1). According to the Committee on the Rights of the Child, the legal duty to consider best interests applies to all decisions and actions that directly or indirectly affect children. Such actions include both those directly aimed at children (e.g. related to health, care and education) and actions including children and other population groups (e.g. related to the environment, housing or transport) (Committee on the Rights of the Child, 2005 and 2013a).

In Article 3(1), "interests" are in the plural, which can be interpreted to describe the variety of a child's different interests. Even though best interests of the child are "a primary consideration", they cannot be regarded as "the" only decisive consideration; other rights and interests have to be taken into account as well. Use of the plural form "children" underlines the primality of the best interests also for groups of children and children in general, as

abstract groups. Considering best interests is equally important regardless of whether best interests are those of an individual child, children as a group or children in general (Committee on the Rights of the Child, 2013a). The duty to consider best interests has several addressees: it obliges both legislative bodies and administrative authorities as well as social welfare institutions and courts of law.

The Committee on the Rights of the Child has suggested a structure for evaluating best interests consisting of a two-step procedure. One should first find out the relevant elements within the specific factual context of the case, give them concrete content, and assign a weight to each in relation to one another. A best interests determination should then follow. The Committee has suggested a comprehensive list of factors that can be significant in determining the best interests (Committee on the Rights of the Child, 2013a). It is important to note that the requirement to consider best interests of the child does not determine the outcome of the case, only the route towards an outcome. In this sense, Article 3(1) is a procedural requirement.

Despite the challenges related to the implementation of Article 3(1) in practice, it is important to distinguish between problematic aspects of Article 3(1) and the fact that according to the rules and principles of international law, Article 3(1), as a part of an international treaty, is legally binding on its States Parties.[2] Regardless of whether we like the best interests concept or not, the consideration of a child's best interests has to be conducted in all cases concerning children. Knowing how the concept is applied in practice offers important information that can be used in improving future decision-making.

3 Finnish Judicial System in Brief

Finland lacks a constitutional court, and the judiciary has traditionally played a limited role insofar as constitutional review of legislation is concerned. Instead, Finland has traditionally had an *ex ante* system of constitutional review in which the Constitutional Law Committee of the Parliament has a strong role in interpreting the constitution: the Committee issues statements on the constitutionality of bills as well as on their consistency with international human rights instruments. For a long time, *ex post* judicial review was prohibited, and courts of law were not allowed to review the constitutionality

2 Vienna Convention on the Law of Treaties, Article 26, formulating the *pacta sunt servanda* principle according to which 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

of Acts of Parliament. This prohibition no longer applies; according to section 106 of the Constitution, if the application of an Act would be in evident conflict with the Constitution, the court shall give primacy to the provision in the Constitution. Given also other constitutional development since the early 1990s, the current state of constitutional review can be described as institutionally pluralist and normatively predominantly rights-based (Lavapuro et al, 2011).

The Constitution of Finland nowadays contains a set of rights and freedoms safeguarded to everybody, including children. A specific provision on children's rights, section 6.3, states that children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development. The provision was added to the Constitution in the large constitutional reform of 1995 inspired by human rights treaties, especially the European Convention on Human Rights (ECHR). The constitutional reform was one of the changes related to the broader transition of human rights culture in Finland. Before 1990, the Finnish Supreme Court had never cited an international treaty in its case law, whereas today Finnish courts often refer to the case law of the European Court of Human Rights (Government Bill HE 309/1993; Lavapuro *et al.*, 2011).

In the Finnish judicial system, civil and criminal cases as well as a number of other cases are concluded by general courts, whilst administrative matters are lodged in administrative courts. The Supreme Court exercises the highest judicial power in civil and criminal cases and the Supreme Administrative Court in cases concerning the application of administrative law. Most of the cases concluded by the Supreme Administrative Court are appeals against decisions of regional administrative courts that are below it in the court hierarchy. In some types of cases there is a system of leave of appeal, whereas in others the complaint is directly admissible to the Supreme Administrative Court.

The implementation of the best interests in the administrative process is especially important because of the close relationship between the use of public powers and fundamental and human rights. According to section 22 of the Constitution, the public authorities shall guarantee the observance of basic rights and liberties and human rights (Constitutional Law Committee PeVM 25/1994 VP). The obligation to apply Article 3(1) in cases concerning children applies to every official, but because of the exercise of public powers, taking fundamental and human rights into account is especially important in the administrative process. Courts have to know the law and apply *ex officio* all the relevant provisions for the claims expressed in the case (Mäenpää, 2013).

4 Materials and Methods

4.1 *Methodology*

The study was conducted by searching Finlex-database (www.finlex.fi), the main database of Finnish sources of law, amongst published yearbook judgments of the Supreme Administrative Court of Finland between 1 September 2001 and 31 December 2014.[3] The index words used were laps*, last* and alaikäi*, different variations of the words "child" and "minor".[4] Fixed endings are common in the Finnish language, which is why an asterisk after the stem of each word was used. Index words are deliberately broad; since the aim was to include all cases concerning children, also those cases where the court has not mentioned the best interests of the child even though it should have done so, had to be included.

The reliability of the research required a coherent definition of an "action concerning children" because reviewing implementation of the best interests requires that attention be paid to whether best interests have been considered in all cases concerning children. When assessing whether or not the cases concerned children, the starting point was the broad and rights-based approach of the Committee on the Rights of the Child reflected, e.g. in General Comment No. 14 (2013a). The criterion used was whether a certain question had a connection to the human rights of the child(ren) concerned. If the answer was positive, the judgment was included in the materials, and vice versa.

Cases included in the initial search results even though they did not concern children were left out of the materials. There were, amongst others, cases where the best interests of the child were mentioned when quoting a provision of national law, but a closer look revealed that children were not concerned. The Supreme Administrative Court often quotes provisions in their entirety,

3 Precedents by the Supreme Administrative Court have been published in Finlex in their entirety from 1 September 2001 onwards. The highest courts make a difference between "published" and "unpublished" decisions; "unpublished" decisions are not published in Finlex in their entirety or in the Court Yearbooks. Unpublished judgments were not included in the study. Previous phases of each case, e.g. decisions by administrative courts and other officials, have been read but not analysed in the study, and attention was directed at paragraphs following the subheading, "Judgment of the Supreme Administrative Court". These paragraphs introduce the court's independent legal reasoning and central arguments. The Supreme Administrative Court may endorse the reasoning of a lower instance, for example the administrative court, but in this study only the Court's own reasoning has been analysed.

4 The terms "child" and "minor" refer in this article to a person under 18 years of age (see Article 1 of the CRC). Unborn children are not mentioned in Article 1, which is why cases concerning unborn children were not included in the study, either.

even though only a part of the provision quoted would be relevant to the case.[5] Cases where the Supreme Administrative Court has overruled a decision made by an administrative court without producing a decision on the merits were left out. Furthermore, cases where the Supreme Administrative Court has asked for a preliminary ruling from the European Court of Justice have been left out, as well as cases whose rationales are too scarce for a closer evaluation. Cases where it seemed clear that best interests have been invoked as an excuse in order to achieve another aim were also excluded.

4.2 *Considering the Best Interests of the Child and Referring to them*

The study is essentially based on the assumption that the consideration of the best interests should be visible in the legal reasoning of the court. Legal argument is carried out via terms and language, which is why references and argument can be assumed to correlate. In other words, the more references to Article 3(1) are found, the more weighing and dialogical the argument is assumed to be. The right to receive a reasoned decision, one of the guarantees of a fair trial and good governance, is protected by section 21.2 of the Finnish Constitution. The European Court of Human Rights has also acknowledged the right to reasoned decisions (see, e.g. *H v. Belgium*, no. 8950/80, Judgment of 30 November 1987; *Hirvisaari v. Finland*, no. 49684/99, Judgment of 27 September 2001). Furthermore, the Committee on the Rights of the Child has paid attention to the importance of legal reasoning by underlining that the justification of a decision must show that relevant rights in question have been explicitly taken into account. A decision must show what has been considered to be in the child's best interests in each specific case, what criteria the decision is based on, and how the child's interests have been weighed against other considerations (Committee on the Rights of the Child, 2013a). If the court does not refer to the best interests or states without further explanation that something is or is not in the best interests of a child, it is impossible to trace which factors the court has taken into account and how these factors have affected the outcome.

The quality of legal reasoning is especially important if the best interests of the child have been limited. The court's reasons for arriving to an outcome that limits the rights and interests of children should be visible, as well as the fact that the limitations are acceptable in light of criteria for limiting human rights. Legal reasoning must then show that the child's best interests were a primary consideration notwithstanding the result. Requirements of Article 12 of the CRC strengthen the

5 An example of an often-quoted provision is section 146 of the Aliens Act, according to which when considering refusal of entry, deportation or prohibition of entry and the duration of the prohibition of entry, particular attention must be paid to the best interests of children and the protection of family life.

importance of legal reasoning; if the decision differs from the views of the child, the reason for that should be explained (Committee on the Rights of the Child, 2013a).[6]

The consideration of best interests thus has to be visible in the reasoning, but what does the requirement to put best interests as a primary "consideration" really mean? According to the *Oxford Dictionary*, "to consider" means 'to think carefully about (something), typically before making a decision', including to 'take (something) into account when making a judgement'. "Considering" seems to entail a genuine and careful assessment of best interests and their role in the context of a specific case, taking account of the features of each situation. Considering best interests and referring to them cannot be fully juxtaposed; "considering" implies a broader, deeper use of the concept. A reference to Article 3(1) of the CRC or to the term "best interests" alone is not a sufficient guarantee that best interests have been genuinely considered, or considered in the rights-based way required by Article 3(1). On the other hand, a lack of a reference to Article 3(1) or a lack of reference to best interests does not necessarily equal a lack of considering them. In light of the right to receive a reasoned decision, however, it can be assumed that all the relevant factors should be included in the reasoning.

The relationship between referring to the best interests of the child and considering them could be formulated in the following way: if the best interests of the child have been referred to in the legal reasoning of the court, it is more likely that the requirements of Article 3(1) have been met. And conversely, if the best interests have not been referred to, it is more likely that the requirements of Article 3(1) have not been met. Even though a reference is not a guarantee of a careful best interests consideration, it is a strong indication of the court having paid attention to best interests. Based on these considerations, cases included in the study have been divided into four categories, of which category 1 is the most precise reference to best interests and category 4 indicates no reference to them. The division provides tools for assessing the preciseness of "considering".

Category 1. Reference to Article 3(1) of the CRC. Referring to Article 3(1) is an indication of paying attention to the CRC and rights guaranteed by it.

Category 2. Reference to best interests but not to Article 3(1). Unlike in category 1, it may not be clear whether best interests have been understood in a rights-based way.

6 The study did not evaluate the whole decision-making process in light of whether best interests have been taken into account or not. Such a broad approach would require, amongst other factors, systematically observing whether the child has had the opportunity to express his or her opinion. This study focuses on the reasoning of the Supreme Administrative Court.

Category 3. No reference to best interests in the reasoning. However, the effect of possible outcomes on the child(ren) concerned is somehow reflected on.

Category 4. No indications of a best interests consideration.

5 Consideration of Best Interests in Different Case Groups

5.1 *Quantitative Results According to Category and Case Type*

The initial search on Finlex gave 351 yearbook judgments by the Supreme Administrative Court between 1 September 2001 and 31 December 2014. 279 cases did not concern children and were thus irrelevant for the study. The rest, 72 cases, form the materials of the study. When applying the division to four categories, the results are the following. Of all the 72 cases, Article 3(1) has been referred to in nine cases (12.5 per cent, category 1). Best interests of the child -term – but not Article 3(1) – has been mentioned in 21 cases (29.2 per cent, category 2). Hence best interests have been expressly referred to in 41.7 per cent of the cases. Best interests have been considered without mentioning the term in 22 cases (30.6 per cent, category 3). Therefore, best interests have been referred to or considered in 72.2 per cent of the cases. 20 cases (27.8 per cent) show no indications of a best interests consideration. Figure 1 illustrates the division of cases into these four categories.

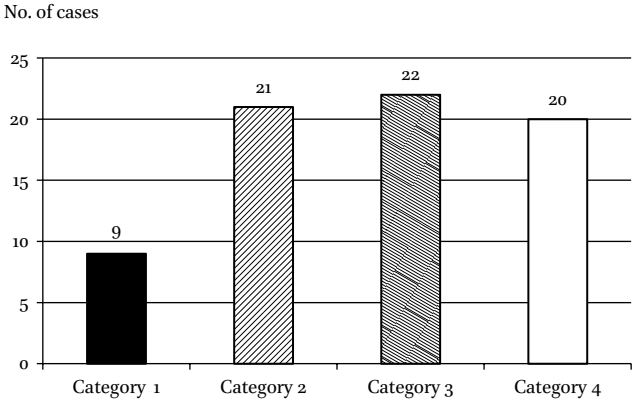

FIGURE 1 *Precedents concerning children by the Supreme Administrative Court of Finland 2001–2014 (total 72) and their division into four categories according to the level of reference to the best interests of the child.*

72.2 per cent is a relatively good result. However, categories 1 and 2 include decisions with relatively or very poor legal reasoning. On the other hand, some decisions of category 3 show that the interests of the child have been taken seriously, even though best interests have not been referred to. In 27.8 per cent of the cases, the reasoning of the court does not show signs of considering best interests, which is alarming. No significant temporal change can be observed in considering best interests from 2001 to 2014.

The cases can be divided further into five groups according to case type: aliens, child welfare, primary education, reimbursements, and environmental permits.[7] The sixth group ("others") consists of six cases not belonging to any of the five groups. Figure 2 presents the quantitative division into case types and categories.

The results indicate that the Supreme Administrative Court has usually considered best interests in cases concerning aliens and child welfare, more vaguely in cases related to primary education and reimbursements and never in cases related to environmental permits. Best interests have not been considered thoroughly in all the precedents but surprisingly well in some of them. In many cases, not even the connection to children has been recognised. The following sections discuss referring and considering best interests in the six case

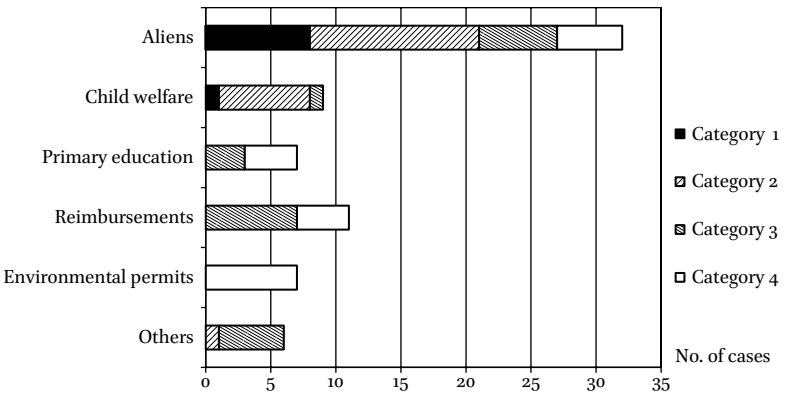

FIGURE 2 *Precedents concerning children by the Supreme Administrative Court of Finland 2001–2014 (total 72) and their division into case types and categories.*

7 This division has been made for the purposes of this study only, and it does not fully comply with the case type division presented by the Supreme Administrative Court. The Court divides cases into nine groups, which are further divided into subcategories. See http://www.kho.fi/fi/index/korkeinhallinto-oikeus/tehtavat/Asiaryhmat.html.

groups. Attention is paid to differences between case types, and interesting or representative cases are presented more in detail.[8]

5.2 *Aliens: Strongest Awareness of International Obligations*

The largest case group consists of alien-related cases (32 cases, 44 per cent of the materials). "Alien" refers in this context to a person who is not a Finnish citizen. Of the 32 cases, the Supreme Administrative Court has referred to Article 3(1) in eight (25 per cent of alien-related cases) and to best interests in 13 (41 per cent) judgments. In six cases (19 per cent), some effort to consider children's rights can be seen, but the term has not been mentioned. In only five cases (16 per cent) the court has not considered the best interests at all. Compared to other case groups, there is a remarkable difference in the number of references to Article 3(1); in addition to the eight aliens-related cases, the materials include only one reference to Article 3(1).

The principal statute applied to alien-related cases is the Aliens Act (Ulkomaalaislaki 30.4.2004/301). According to section 6 of the Aliens Act, in decisions concerning a child, special attention shall be paid to the best interests of the child and to circumstances related to the child's development and health. Preparatory works of the Aliens Act show awareness of the binding nature of the CRC, but the connection between best interests of the child and fundamental and human rights does not get special attention (Government Bill HE 28/2003 vp). The Act itself mentions best interests of the child several times in the context of requirement for means of support when issuing a residence permit, issuing residence permits on compassionate grounds, authorities' right to receive information, overall consideration of refusal or entry, and grounds for deporting EU citizens and their family members.

Aliens-related judgments usually have concerned family reunification, international protection, deportation or citizenship applications. Six out of eight cases concerning family reunification related to the requirement for means of support refer to Article 3(1).[9] Issuing a residence permit requires that the alien has a secure means of support, but an exemption can be made if there

8 Translations of the decisions by the Supreme Administrative Court are my own. The decisions can be found in Finnish and some of them in Swedish at www.finlex.fi. Translations of Finnish laws used are unofficial translations issued by respective ministries. Since the translations are unofficial, no special importance should be attached to the wording – the Acts are legally binding in Finnish and Swedish only.

9 These are the following: KHO 2014:51, KHO 2014:50, KHO 2013:97, KHO 2009:85, KHO 2003:92, and KHO 2003:28. The remaining two cases relating to the requirement for means of support are KHO 2010:18 and KHO 2010:17. KHO 2003:28 was concluded prior to adding the exemption on the grounds of best interests to the Aliens Act.

are exceptionally weighty reasons or if the exemption is in the best interests of the child.[10] Another group consists of cases concerning international protection. In the majority of these decisions, best interests have not been mentioned or considered (KHO 2014:114, KHO 2014:112, KHO 2013:113, all belong to category 4) except in KHO 2013:23 (category 2). In cases related to deportation, the Supreme Administrative Court has often referred to best interests (KHO 2012:47, KHO 2006:83, and KHO 2006:82, all belong to category 2) and sometimes considered them vaguely (KHO 2004:124, category 3). A fourth group consists of cases concerning the grounds on which a child can get Finnish citizenship (KHO 2012:28, KHO 2011:78, KHO 2011:77, category 3). In conclusion, the Supreme Administrative Court has considered best interests better in cases concerning aliens than in other case groups. This applies especially to cases concerning the requirement for means of support. In cases concerning international protection, other considerations have been more decisive.

5.3 *Child Welfare: Advanced Interpretations, Colliding Interests*

Giving best interests a central role is one of the main principles of child welfare,[11] and preparatory works of the Child Welfare Act (Lastensuojelulaki, 13.4.2007/417) refer to the requirements of Article 3(1) of the CRC (Constitutional Law Committee PeVL 58/2006 vp) and to the Convention as a whole (Government Bill HE 252/2006 vp). All the child welfare cases included in the study are related to taking a child into care, a situation where a child's best interests often collide with interests of parents or other guardians. Taking a child into care constitutes a grave intrusion of private life; interference of the private sphere, including the right to respect for privacy and family life protected by Article 8 of the ECHR, must always be an exceptional and last-resort measure, and used only when the best interests of the child cannot be otherwise secured (Government Bill HE 309/1993 vp). In Finland, taking a child into care is decided by an administrative court if a 12-year-old child or his or her custodian opposes the procedure.

The study contains nine cases (13 per cent) related to child welfare, of which one (11 per cent of child welfare cases) contains a reference to Article 3(1) and

10 The possibility to make an exemption on the grounds of best interests was added to the Act by the initiative of the Administration Committee and the Constitutional Law Committee, see HaVM 4/2004 vp and PeVL 4/2004 vp.

11 See Section 4 of the Child Welfare Act. The current Child Welfare Act came into force in 2008, which means that some of the child welfare cases included in the study were concluded during the old law. However, provisions concerning best interests and child participation were similar in general outline in the old law.

seven (78 per cent) to best interests. In one case (11 per cent), the Supreme Administrative Court has reflected general implications of a child's interests without mentioning the term. Therefore, the court has considered the best interests in all the child welfare cases. This is probably due to the role of the best interests principle as one of the main principles of child welfare.

Despite the diligent referencing practice to the best interests of the child, Article 3(1) has been referred to in one child welfare-related case only. That case (KHO 2004:121) is the oldest of the child welfare cases, and no obvious reason for the reference in that case can be found. Because of the growing importance of human rights in recent years, it would be logical to assume new cases to contain more references to Article 3(1). The lack of references to Article 3(1) in child welfare cases seems surprising. It seems, however, that even though Article 3(1) is not referred to, the role of best interests is significant. In KHO 2011:113 (category 2), the Supreme Administrative Court had to assess whether ending custody of ten years was clearly against the best interests of the child in question. In its reasoning, the court does not define the contents of best interests; the child's conditions, for instance the emotional bond to the foster family have, however, been considered. The court did not take for granted that living with his biological father would automatically be in the best interests of the child. The court also organised a hearing where the child was able to express his opinion. The court ended the custody and returned the child to live with his father, as the child had wished. Previous instances came to different conclusions based on their own best interests assessments. This seems natural since the child had changed his opinion after having spent more time with his father.

The Supreme Administrative Court organised a hearing also in KHO 2006:42 (category 2). The six-year old was not heard, but it is explained in the reasoning that according to a witness, the child wanted to move from the children's village where she had been living for some time to the family of her godmother. The child was placed at the godmother's home as she wished. The court reasoned that even though the opinion of a young child cannot be decisive, it affects the overall evaluation. The placement being in the best interests of the child required that her ties to important people in the children's village would be preserved. In addition, the godmother's family had to be supported and the child had to get the support she might need, for example play therapy. Description of the godmother's family is down-to-earth; according to the court, the family had seemed to form 'with its strengths and weaknesses a normal family capable of an ordinary upbringing that also sets limits for the child'. Upbringing in a 'normal family' was therefore enough to secure best interests of the child; 'professional foster parenthood and adult-led affection-building

care' emphasised by one of the child psychiatrists heard before the Supreme Administrative Court were not considered necessary.

In contrast, a questionable taking of a child into care was administered in KHO 2011:99 (category 2). A mentally disabled mother – but only mildly so – would have needed comprehensive support in order to take care of her child at home; the child had lived in an establishment since her birth. The Supreme Administrative Court tried to strike a balance between the best interests of the child, right to respect for family life, and placing the mother in a different position with other mothers. According to the court, taking the child into care had been necessary in order to secure for the child a highquality growing environment protected by the Child Welfare Act. The European Court of Human Rights found a violation of Article 8 of the ECHR in *K. & T. v. Finland*, where a new-born had been taken into care straight after birth (K. & T. v. Finland [GC], no. 25702/94, Judgment of 12 July 2001). In *K. & T. v. Finland*, the reason for the placement had been distrust in the parents' capabilities to take care of the child since the mother was mentally ill. In KHO 2011:99, the real motivation for taking the child into care raises suspicions; the Supreme Administrative Court states that the social security service does not have enough resources to provide the mother with long-time and round-the-clock support. Were colliding interests in this case really the interests of the child and those of the mother – or rather the interests of the child and the financial interests of the state, only mentioned in passing in the reasoning of the court? In light of criteria for limiting fundamental and human rights, including the prohibition of retrogression of economic and social rights, it is questionable whether taking the child into care was legitimate, necessary and in the child's best interests.

5.4 *Primary Education: Traditionally not Associated with Best Interests*

A central provision in matters related to education is section 16.1 of the Constitution of Finland, according to which everybody is entitled to basic education free of charge. "Basic education" covers all teaching included in compulsory education (Government Bill HE 309/1993 vp), and it consists of nine years of comprehensive school for the whole age group. Right to compulsory and free education is also guaranteed by Article 28 of the CRC, and the Committee on the Rights of the Child has named education as one of the elements to be considered in a best interests assessment (Committee on the Rights of the Child, 2013a).

Cases concerning education do not show a profound awareness of children's interests and rights. There are seven cases related to primary education (10 per cent of all the cases), of which three (43 per cent) belong to category 3 and four

(57 per cent) to category 4. This result was unsurprising; Hakalehto-Wainio mentions education as an example of a case group traditionally not associated with best interests of children in Finland (Hakalehto-Wainio, 2013).[12]

Best interests of the child are not mentioned in the Basic Education Act (Perusopetuslaki, 21.8.1998/628) or in its preparatory works, which may have contributed to the non-existent amount of references to best interests. Consequently, best interests are not automatically mentioned by quoting a provision of the Act, which has often been the case with aliens and child welfare. Preparatory works of the Basic Education Act do refer to the CRC, but whether the binding nature of the Convention has been understood is not clear; preparatory works state that even though the CRC is 'as binding as any legislation in general', its contents are 'partly declaratory' and that the Convention does not require that rights enshrined in it be guaranteed by the constitution or by a regular act (Government Bill HE 86/1997 vp). Article 4 of the CRC does indeed leave a margin to the States Parties concerning the implementation of the Convention. Yet, the declarative nature of some provisions does not signify that the Convention is not binding. Furthermore, the Committee on the Rights of the Child has emphasised the need to include a comprehensive reference to the best interests in national legislation (Committee on the Rights of the Child, 2011).

Basic education should, according to Article 28 of the CRC, be *both* free *and* compulsory. According to the Finnish Constitutional Law Committee, the right to free basic education extends not only to educational materials but also to necessary school transport and adequate nutrition (Constitutional Law Committee PeVM 25/1994 vp). Tuition-free primary education has been brought up in four cases. In KHO 2007:5 (category 3), the municipality had withheld free school transport because the residential zone where the child's family lived was not meant for permanent living. The Supreme Administrative Court overruled the decision on the basis that the right to basic education, free of charge, covers necessary transportation.

Perhaps the most questionable case concerning primary education is KHO 2009:33 (category 4), where the municipality had laid teachers off. The applicant argued before the administrative court that during layoffs, high-class teaching was in danger, which led to restricted learning possibilities. The

12 The materials include seven cases concerning basic education as opposed to 32 cases concerning aliens, which is why the percentages are not directly comparable. Some general observations can still be made; it is remarkable that the Supreme Administrative Court has not referred to Article 3(1) or to best interests in any of the cases concerning basic education.

applicant also claimed that layoffs were not in keeping with the CRC and other obligations. Nevertheless, the Supreme Administrative Court does not discuss the alleged endangering of children's rights apart from mentioning that the municipality has adequately examined how the layoffs can be administrated so that the right to basic and secondary education can be safeguarded in the way intended in the provisions. The court consequently stated that the layoffs were not against the law. This outcome seems problematic; since fundamental and human rights such as the right to free education cannot be limited on arbitrary grounds, the Supreme Administrative Court should have considered whether the layoffs were proportionate and necessary in light of criteria for limiting human rights.

5.5 *Reimbursements: Special Arrangements for Disabled Children*

The fourth case group consists of reimbursement-related cases. A reimbursement refers here to a leave granted to the child's guardians in order to help the (often disabled) child survive in his or her daily life. A reimbursement can be given on the grounds of renovations made to the home, devices installed in the home as well as the costs of acquiring devices and equipment. The materials include 11 rulings concerning reimbursements (15 per cent of all the cases). In seven cases (64 per cent of cases related to reimbursements), best interests have been considered without mentioning the term whereas in four cases (36 per cent) children's interests have not been considered at all. Cases concerning reimbursements do not therefore contain direct references to best interests or to Article 3(1) of the CRC.[13]

The connection between best interests and reimbursements is not evident. However, I argue these cases concern children in an indirect way. Reimbursement-related cases have many common features with cases concerning the right to free basic education. If a reimbursement is not received, it often seems likely that the disabled child will not benefit of a special arrangement that would improve his or her life quality and contribute to the realisation of many rights. The Committee on the Rights of the Child has explicitly stated that the legal duty to consider best interests applies to actions indirectly affecting children. The Committee has also named disability as a form of

13 Cases concerning retroactive demands for compensation were not included in the study. Cases concerning retroactive compensation may, for example, relate to a disagreement between two municipalities where one of them has to remunerate the costs caused by child welfare. Retroactive compensation is not connected to children's best interests; which of the two municipalities remunerated the costs in the past does not affect the rights of the child in need of child welfare.

vulnerability and as one of the elements to be taken into account when assessing best interests (Committee on the Rights of the Child, 2013a). Article 2 of the CRC prohibits discrimination based on disability, and Article 23 emphasises the responsibility to ensure a full life for disabled children. Assistance offered to the child and those responsible for him or her should be provided free of charge where possible, taking into account the financial resources of the parents or others caring for the child, and should be directed at various areas of life, such as recreation opportunities.

Some of the cases concerning reimbursements are well reasoned and thorough. In KHO 2012:36 (category 3), the court concluded that the disabled child had the right to receive a reimbursement for a hobby outside of his home, since that would support him in learning independent survival skills. The reasoning shows special needs of the child have been considered. In KHO 2011:18 (category 3) a severely disabled child had the right to receive reimbursements for renovations that were necessary because of severe behavioural problems. In KHO 2008:61 (category 3), the court concluded that the disabled child had a right to outside activities and granted a reimbursement for building a fence. The court paid attention to the importance of outdoor activities for the development of the child and considered the fence crucial in this regard. This view is in accordance with Article 31 of the CRC on the right to rest and leisure and to engage in play and recreational activities. Despite these well-reasoned rulings, many cases leave unclear whether the outcome has been reached by considering the child's best interests. The court may, rather, have taken into account the interests of any disabled person who happens to be under 18 years of age, rather than paid special attention to the child.[14]

5.6 *Environmental Permits: Connection to Children not Recognised*

Materials include seven cases (10 per cent of all the cases) related to environmental permits. The Committee on the Rights of the Child classifies cases related to the environment as indirectly concerning children (Committee on the Rights of the Child, 2005). The Supreme Administrative Court, in contrast, has not mentioned or considered best interests in any of the seven cases (all category 4); in fact, the decisions by the Supreme Administrative Court do not even indicate a connection to children. The reason why these cases were included in the search results is that in earlier stages someone – the applicant, the environmental committee, or other organ that previously dealt with the matter – has argued that the case has an impact on children. Since materials of

14 See, for instance, KHO 2006:66 (category 4) The reasoning does not reflect the special importance relating to the child in question. The fact that somebody is a child cannot, of course, be separated from the other attributes of that person.

the study only include cases where a claim about an effect on children has been made, there may be cases related to environmental permits that concern children in reality but whose connection to children has not been recognised. Building a new road next to a school may make young children's school routes more dangerous – which obviously does not mean that new roads should not be built, but that best interests of children should be considered in the decision-making process.

An example of an environmental permit case concerning children indirectly is KHO 2011:48, where a company had applied for a mining permission. The environmental committee had refused the application on the basis, inter alia, that mining would cause health problems for residents and operators of the district which would not be fully eliminated via the permit regulations. According to the environmental committee, nearby children would suffer from severe danger caused by additional traffic. It can therefore be argued that KHO 2011:48 concerns children; at least the environmental committee has thought so when stating that mining would put children in severe danger. The Supreme Administrative Court has based its decision on other arguments, all of them unrelated to children's rights, and ignored allegations made by the environmental committee. In KHO 2013:163, KHO 2012:79, KHO 2008:37, KHO 2005:4, KHO 2004:72, and KHO 2004:9 the setting resembles that of KHO 2011:48.

The Supreme Administrative Court has not perceived a connection between environmental permits and children's rights. Since opportunities for children to deal independently with environmental matters are limited, it is necessary that officials look after their interests. If the court suggests, in opposition to the applicant's or the environmental committee's views, that the case does not concern children, the reasoning should demonstrate that the question has been assessed regardless of the outcome.

5.7 *Others*

Six cases (8 per cent of all the cases) do not belong to any of the case groups referred to. One of these six decisions refers to the best interests, and in five of them interests have been considered without mentioning the term itself. Since each case is different, no further conclusions can be made.

6 Implications of the Results

6.1 *Meaning Accorded to Best Interests*

As shown, there are differences between case groups in how diligently the best interests of the child are considered in the cases included in the study. The next sections discuss factors that could explain the differences between case

types in considering the best interests of the child, as well as tendencies in how the Supreme Administrative Court has understood the best interests concept in different case types. Aliens and child welfare -related cases are discussed in more detail, because there were no direct references to best interests in other case groups.

In cases concerning aliens and child welfare, the Supreme Administrative Court has considered best interests competently compared to other case types. One reason for this seems to be that best interests have been mentioned in the applicable legislation. Preparatory works of the Aliens Act and Child Welfare Act highlight the importance of considering best interests, as well as the duty to interpret them in accordance with the CRC (Government Bills HE 252/2006 vp, HE 28/2003 vp). Mentioning the best interests in the applicable law seems to increase the probability of referring to the best interests in the decision.

However, the inclusion of the expression "best interests" in the applicable law or its preparatory works does not explain why Article 3(1) has been referred to much more often in cases concerning aliens. The Aliens Act is built around the legal status of foreigners, and matters concerning children are sometimes raised, whereas children are the focus of the Child Welfare Act. Taking international obligations routinely into account would therefore be reasonable. The general clause on best interests of the child in the Child Welfare Act (section 4) is also more holistic than its equivalent in the Aliens Act (section 6), since best interests are expressly named as one of the general principles of child welfare. Argument is nevertheless good in many child welfare -related cases; the Supreme Administrative Court has often organised a hearing – the administrative process is for the most part written, and the Supreme Administrative Court usually contents itself with the hearing organised at the administrative court – and some decisions clearly reflect the views of the child.

The meaning accorded to best interests varies between different case types. The case-by-case nature of assessing best interests sets limits to generalising interpretations; the aim is not to give the concept a fixed meaning, as the Committee on the Rights of the Child has pointed out (Committee on the Rights of the Child, 2013a). It is therefore natural and even necessary that best interests are understood differently in different case groups. Typical situations in different case groups are different, which leads to the activation of different rights. In child welfare cases, for example, the Supreme Administrative Court has often emphasised safety and physical integrity (KHO 2013:196, category 2) and good growing conditions (KHO 2006:42). Aliens-related cases are often about striking a fair balance between children's interests and the interests of society, which shifts the focus of the argument. In cases concerning aliens,

Article 3(1) has been referred to mostly in cases related to the requirement for means of support (section 39 of the Aliens Act). As a rule, the Supreme Administrative Court has made an exemption from the requirement on the grounds of best interests if the child is permanently ill or disabled.[15] In KHO 2014:51 (category 1), the applicant who was applying for a residence permit had three children in Finland, one of them suffering from a permanent illness. The Supreme Administrative Court considered factors of a good and healthy development and concluded that the child was dependent on healthcare services, which is why the Court allowed the family to stay in Finland even though the requirement for means of support was not met. The illness was a decisive factor; the Court stated that the possibility of the parent and the child being separated does not in itself form the basis for an exemption on the grounds of the best interests of the child, but that an exemption entails also 'other individual factors or circumstances that have a concrete impact on the best interests of the child'. The threshold was thus set high, but since the child was ill, an exemption could be made. The reasoning of a deportation-related case, KHO 2004:124 (category 1), equally implies that the Asperger's syndrome of the 12-year-old child was one of the decisive factors that prevented the applicant from being deported.

Paying attention to rights of vulnerable children is in conformity with the CRC, especially with Article 24 on the right of the child to the enjoyment of the highest attainable standard of health. According to the Committee on the Rights of the Child, the child's right to health is a central element in assessing best interests (Committee on the Rights of the Child, 2013a and 2013b). However, systematically leaning towards a negative interpretation of best interests – that interests of a healthy child would not be decisive enough in themselves – is not desirable. A negative interpretation can be found in KHO 2014:50 (category 1), where the threshold for making an exemption was the same as in KHO 2014:51: separation of the child and parents is not enough tomake an exemption, other individual factors have to exist. The Court does not, however, specify what these other factors and circumstances might be, and the case law of the European Court of Human Rights is quoted rather selectively.

Even though elements included in a best interests assessment cannot be ranked, the absolute nature of some fundamental and human rights has an effect on how assessing best interests proceeds. Absolute human rights, such as right to life and freedom from torture, cannot be limited. In cases entailing

15 See, e.g. KHO 2014:51, KHO 2010:18, and KHO 2004:124. KHO 2003:92 is an exemption from this rule, and the best interests of the child were included in the Aliens Act partly because of this decision. See Constitutional Law Committee PeVL 4/2004 vp, p. 4.

an alleged breach of an absolute human right of a specific child, the difficulty of assessing best interests is related more to evaluating the facts of the present case, i.e. to evaluating the existence or strength of a certain causal relation, than to whether a certain act or omission is categorically against the interests of the child. For example, violations of physical integrity are always against the best interests of any child. In KHO 2013:196, a three-year-old child suffered from injuries that, according to medical experts, could not have been caused by the child himself. Factual evidence was central in deciding whether the child should be separated from his parents against the general rule, according to which separating a child from the parents is not allowed against their will except when it is necessary for the best interests of the child (Article 9 CRC). Abuse is one of the exceptions mentioned in Article 9. The burden of proof was on the parents: the Supreme Administrative Court concluded that since the parents were not able to identify the possible origin(s) of the child's injury in a reliable way, the child's health and development had been put at risk.

In addition to the absoluteness of the right in question, another factor affecting the best interests assessment process is whether the case in question concerns specific children or children as an abstract group. The more the effects of a decision concern a known individual child or a known group of children, the more important a future-orientated impact assessment becomes. When children are seen as an abstract group, unforeseen factors in real life need not be taken into account. KHO 2013:136 (category 3) and KHO 2014:118 (category 3) illustrate this argument. The former case was about sexual crimes affecting children, the latter about the impact of a previously committed sexual crime on the granting of a gun permit. In these two cases, children are seen as an abstract group with the right to physical integrity. No fact-derived assessment was made in these cases, unlike in KHO 2013:196.

Subjectivity is one of the main problems in best interest assessments. The meaning accorded to best interests is formed in relation to what is seen as being in the best interests of a child in a certain situation at a given moment (Committee on the Rights of the Child, 2013a). Zermatten has described the best interests principle as "doubly subjective". First, best interests are affected by collective subjectivity; there is always an ideal of what constitutes them. Second, best interests are affected by three levels of personal subjectivity: subjectivity of parents, caregivers or legal representatives; subjectivity of the child(ren) in question; and that of the judge, or of the decision-makers (Zermatten, 2010). KHO 2005:87 (category 2) concerning child marriage is an example of the subjectivity related to assessing best interests. In the case, A had applied for a residence permit on the grounds of a marriage with his 15-year-old cousin, B, who lived with her parents in Finland. According to the Supreme

Administrative Court, at the time of the marriage, B was dependent on her parents in such a way that she cannot have given her full consent to the marriage. The Court pointed out that immigrant girls have an equal right to choose their spouse notwithstanding their cultural and religious background, and assessed that the granting of a residence permit would not have been in accordance with the principle of the best interests of the child. Consequently, the court did not recognise the marriage. The outcome of the case is contrary to B's wishes, which is interesting in light of Article 12 of the CRC; B herself had insisted that her opinion should be taken into account. Hearing a child and taking account of his or wishes is a central element of an adequate best interests assessment. The outcome of the case, however, seems to be the one that best respects B's rights.

According to Zermatten, personal subjectivity can appear as the subjectivity of parents, caregivers or legal representatives. The study includes cases where the guardian of the child suggests something is in the best interests of the child even though it does not seem to be objectively so. In KHO 2006:60 (category 3), the Supreme Administrative Court ruled that costs of private day care cannot be covered by social assistance, the last resort form of income security. The applicants' arguments – the children's allergy to mould and asthma, the small group size favourable for one of the children suffering from ADHD, and Christian values – do not make it plausible that the interests of the children would be better taken care of in private day care. The guardian is responsible for the child, but the guardian does not have a right to define the child's best interests in the way he or she prefers.

Another level of personal subjectivity is that of judges and decision-makers. In rare cases the Supreme Administrative Court has regarded best interests of the child require the existence of circumstances and factors that do not seem necessary. The problem seems then – a little surprisingly – to be a too broad and non-judicial interpretation of best interests.[16] The rights-based approach is comprehensive in itself. It is necessary to pay attention to what kind of factors can be linked to the best interests in a well-reasoned way, especially as rulings of the Supreme Administrative Court carry general importance.

6.2 *Role of Article 3(1) and Rights-based Argument*

Of the two central changes brought by the CRC to the concept of the best interests of the child, the study presented in this article concentrates on the obligation to consider the best interests of the child in all actions concerning children. The second significant change, the connection of the best interests to the human rights of children, is equally important. In the cases included in

16 See KHO 2008:53 (category 2).

the study, the Supreme Administrative Court has rarely identified children's interests in terms of rights. In KHO 2009:85 (category 1) concerning family reunification, the children of the parent residing in Finland had lived with their mother outside Finland for their whole life. The Supreme Administrative Court states that the family does not have 'invincible obstacles' to enjoy family life in Ethiopia if they wish so. The court enumerates several provisions that 'have to be taken into account for their part', but the significance of the provisions is hardly embarked on. A statement that something is or is not in the child's best interests is not a sufficient in order to put best interests as a primary consideration.

Liefaard and Doek have identified different functions of the CRC in domestic and international law. The CRC can function, inter alia, as a tool for interpretation of domestic law or other human rights standards, as a "gap-filler", closing gaps in domestic or international law, as the higher standard, as a limiting standard with regard to factors such as local custom and practices or religion, or as an embodiment of principles of international customary law (Liefaard and Doek, 2015). In the cases included in the study, Article 3(1) of the CRC has rarely been introduced as an independent argument. In the nine cases where it has been referred to, Article 3(1) has usually been mentioned alongside other provisions, such as national legislation and relevant provisions of the ECHR. The importance and weight of the provisions in the case that is being concluded has not usually received further attention. The Supreme Administrative Court has referred in some cases to the UNHCR Guidelines on Determining the Best Interests of the Child, but the quoted phrases concentrate on well-being and on the lack of a precise definition, not clearly explaining the interplay between children's best interests and rights. These paragraphs do not clarify enough the rights-based nature of the CRC. The UNHCR Guidelines also state that the interpretation and application of the best interests of the child must conform with the CRC and other international legal norms (UNHCR, 2008), which is absolutely correct.

Article 3(1) seems to have been the independent foundation of the decision only in an aliens-related case KHO 2003:28 (category 1), where the Supreme Administrative Court had to consider whether a child could be granted a residence permit based on his parent's marriage to a Finnish national. The Court pointed out that the requirement for means of support cannot override obligations enshrined in the CRC. The case was returned to the immigration service to find out whether it is in the best interests of the child to follow the parent to Finland, which would lead to an exemption from the requirement for means of support, or whether it would be in the best interests of the child to live in his

home country, in which case the best interests of the child would require that the parent's residence permit be refused. In KHO 2003:28, Article 3(1) (or broadly speaking, the obligations of the CRC overall) was a decisive argument.

As to the "primary" role of best interests in the decisions of the Supreme Administrative Court, it is remarkable that the best interests have rarely been introduced as the first consideration. In the cases related to the requirement for means of support, for instance, the Court has first looked at whether the requirement for means of support is met, and only after that whether an exemption has to be made on the grounds of the best interests. This order derives from the Aliens Act. A relevant question, however, is what the "primality" of best interests really means. Does the primality impose requirements as to the order of considering different factors? How could the structure of the argument be construed so that it would leave room to apply Article 3(1) independently?

7 Conclusions

The study shows that the Supreme Administrative Court has understood the scope of applying the concept of the best interests of the child in a narrower way than it should according to Article 3(1) of the CRC. Best interests have been referred to relatively often in the decisions of the Supreme Administrative Court. Direct references to the best interests have been made in 41.7 per cent of the cases, and best interests have somehow been brought up in 72.2 per cent of the cases included in the study. On the other hand, the Court has not considered the best interests in any way in 27.8 per cent of its judgments concerning children. The Court has considered the best interests of the child in an advanced way in some cases, but the consideration of best interests and the role given to them varies significantly between case types. Even though different case types are not directly comparable due to the limited number of cases in some groups, some general outlines can be found. The traditional idea of best interests seems to be dominant, since cases related to education, reimbursements and environmental permits do not show awareness of the need to take best interests into account.

The quality and breadth of legal reasoning of the Supreme Administrative Court vary between cases. Mentioning best interests does not necessarily mean that best interests have been appropriately considered. On the other hand, best interests may have been considered in the spirit of Article 3(1), even though the Article has not been mentioned. In some cases, best interests

have been thoroughly considered, but the effect of facts on the outcome is not always clear. Considering and assessing the child's different interests has usually lead to a better outcome than referring to Article 3(1) without a careful weighing of interests. However, a high number of references to best interests and to the CRC is desirable; it demonstrates a higher level of attention accorded to the CRC and to the human rights of children in general.

The right to receive a reasoned decision is endangered without a clear and comprehensive rationale. Opening the argumentation would help in finding the best solution in light of facts and relevant provisions. What does considering best interests entail in a particular case? What kind of importance does a certain provision have in light of the facts of the case? To which result does considering the best interests lead? Providing answers to these questions is important so that an outside observer can assess whether the procedural requirements of Article 3(1) have been met. The quality of legal reasoning is crucial when the court arrives at a result limiting best interests. The court may weigh best interests and other protectable interests or rights against each other and come to the conclusion that the other interests are more important. Legal reasoning is, then, the only way to ensure that the requirements of Article 3(1) as well as the criteria for limiting fundamental and human rights are met.

In its Concluding Observations to Finland in 2011, the Committee on the Rights of the Child stated that there is no 'comprehensive reference' to the best interests in Finnish legislation (Committee on the Rights of the Child, 2011). Results of the study presented in this article support the idea of including such a reference in national legislation, since best interests have been referred to more often in cases where they have been mentioned in the applicable law or its preparatory works. The inclusion of best interests in the Aliens Act and Child Welfare Act is likely to have contributed to a larger attention to best interests in cases related to aliens and child welfare. Including a reference to the best interests in the Basic Education Act, for instance, would be essential. Furthermore, it would be advisable not only to refer to the best interests in national legislation, but to refer to them as a primary consideration.

In addition, a constitutional provision on the primality of best interests would clarify the obligation of taking the best interests of the child actively into account in legislation, decision-making and administration (Hakalehto-Wainio, 2013). A constitutional provision on considering best interests would increase awareness of the comprehensive nature of Article 3(1), since a statement by the Constitutional Law Committee concerning the matter would be available. The broadness of Article 3(1) leads inevitably to situations where best interests are relevant but are not covered by a national law provision

expressly mentioning the best interests of the child. This would require Article 3(1), or an equivalent constitutional provision, to be directly applied in order to get the most out of its potential and to fulfil the requirements of the CRC.

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A comparison of child protection and immigration jurisprudence of the European Court of Human Rights: what role for the best interests of the child?

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Keywords: Best interests of the child – children's rights – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 – European Court of Human Rights – child protection – immigration

The obligation to consider the best interests of the child in all cases concerning children has a central status in the United Nations Convention on the Rights of the Child 1989. This article provides a systematic comparison of how the best interests concept is understood and used in child protection and immigration jurisprudence of the European Court of Human Rights. The article compares all child protection and immigration judgments where the court has referred to the best interests of the child until the end of 2017. It shows that the court assesses the best interests of the child differently in the two case groups. First, in child protection cases, the court assumes that it is in the child's best interests to live with her parents, whereas in immigration cases, family unity is not the starting point of the court. Secondly, in immigration cases, the child's young age is understood as adaptability, whereas in child protection cases, young age is associated with care needs. Thirdly, the court has considered children's views in several child protection cases but rarely in immigration cases. This article argues that, from the perspective of children's rights, the court's approach in immigration cases is problematic.

II

Introduction

The United Nations Convention on the Rights of the Child 1989 (CRC) requires in its Article 3(1) that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. The Committee on the Rights of the Child, the monitoring body of the CRC, has elevated Article 3 as one of the 'general principles' of the Convention and stated that best interests have to be understood in a rights-based way,[1] ensuring the full and effective enjoyment of all the rights recognised in the CRC and the holistic development of a child. In addition, best interests have to be 'a primary consideration' in *all* cases concerning children, which means that they have special importance and are not only applicable in matters with an obvious connection to children's rights but also in areas where the children's rights perspective has traditionally not been prominent.[2] The concept of best interests

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1 Committee on the Rights of the Child, *Summary Record of the 11th Meeting*, 7 October 1991 (UN Doc CRC/C/1991/SR.11).

2 Committee on the Rights of the Child, *General Comment No 14* (2013) on the right of the child to have his or her interests taken as a primary consideration (art 3, para 1) (UN Doc CRC/C/GC/14); see also M Freeman, 'Article 3. The Best Interests of the Child', in A Alen et al (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff, 2007); J Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 IJCR 483.

has been criticised for being indeterminate and paternalistic, among other reasons.[3] To understand the validity of such criticism, further scrutiny of how the concept behaves in concrete situations where rights conflict is required.

This article compares how the European Court of Human Rights (ECtHR or the court) understands and uses the concept of the best interests of the child in child protection versus immigration jurisprudence. The jurisprudence of the ECtHR has been described as a measure of the practical significance that is attached to children's rights in the sphere of the protection of international human rights.[4] The best interests concept is not included in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention), but it is relatively well established in the jurisprudence of the ECtHR.[5] Overall, the European Convention is subject to the general rules of treaty interpretation, including that any relevant rules of international law applicable in the relations between the parties shall be taken into account.[6] All the contracting parties to the European Convention have ratified the CRC, which strengthens the CRC's role in the interpretation of the European Convention. Indeed, the ECtHR has acknowledged the CRC's importance on several occasions.[7] The ECtHR has noted that authorities must consider best interests in their proportionality assessments and that this balance must be safeguarded by taking into account international conventions, notably the CRC.[8] The need to apply the concept in various contexts has also been recognised.[9] However, the court's argumentation regarding best interests has been criticised for inconsistency and for relying on the concept as a rhetorical device that has no real effect on the reasoning.[10]

This article is based on all judgments concerning child protection and immigration until the end of 2017 in which the ECtHR has referred to the best interests of the child.[11] The cases were obtained from HUDOC using the index words 'best interests', 'best interest', 'intérêt supérieur', and 'intérêts supérieurs' amongst Chamber and Grand Chamber judgments.[12] As the objective was to analyse the ECtHR's understanding of best interests, argumentation by parties or national courts was not systematically analysed. It is important to remember, however, that the

3 See, eg, RH Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law & Contemporary Problems* 226; N Cantwell, 'Are Children's Rights Still Human?' in A Intervenizzi and J Williams (eds), *The Human Rights of Children. From Visions to Implementation* (Ashgate, 2011).

4 C Breen, *The Standard of the Best Interests of the Child. A Western Tradition in International and Comparative Law* (Martinus Nijhoff Publishers, 2002), 241–242; C Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law. 'Living instrument' or extinguished sovereignty?* (Hart, 2017), 278.

5 A Faye Jacobsen, 'Children's Rights in the European Court of Human Rights – An Emerging Power Structure' (2016) 24 IJCR 548; U Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23(2) HRQ 308.

6 Vienna Convention on the Law of Treaties 1969, art 31(3)(c).

7 See, eg, *Harroudj v France* (Application No 43631/09) 4 October 2012, [42] where the court stated that the European Convention obligations regarding children's rights must be interpreted in light of the CRC; *KT v Norway* (Application No 26664/03) (2008) 49 EHRR 82, [43]: 'The human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child'. In addition to the rules of international law on treaty interpretation, evolutive interpretation and European consensus allow the ECtHR to rely on other Conventions, see *Tyrer v United Kingdom* (Application No 5856/72) (1979–80) 2 EHRR 1; *Rasmussen v Denmark* (Application No 8777/79) (1984) 7 EHRR 371.

8 See, eg, *Senigo Longue and Others v France* (Application No 19113/09) 10 July 2014, [68].

9 *Maslov v Austria* (Application No 1638/03) (2008) 47 EHRR 20, [82].

10 Breen, above n 4, 392.

11 65 child protection cases and 43 immigration cases. Immigration detention cases were excluded, since their focus differs from first-entry and expulsion cases.

12 hudoc.echr.coe.int; index words were in English and French, the official languages of the Council of Europe – all cases are available in either language but not always in both.

court's judgments are not created in a vacuum but are shaped by the arguments of the parties.[13] Furthermore, a reference to 'best interests' does not fully convey how the court understands the best interests of the child and what weight it accords to children's rights in different situations, nor does it guarantee an outcome that complies with the rights of the child. Use of the term is 'no substitute for proper argument'.[14] Conversely, an outcome that respects the rights of the child can be reached without mentioning best interests. However, analysing references to the term reveals the kind of connotations that the court attaches to it.

Child protection and immigration cases differ in several important respects. In child protection cases, as in most scenarios concerning interference in family life, the child's rights and interests are the reason for interference, and the competing rights are those of the child and those of parents. In immigration cases, the right to respect for family life of the child and parents is contrasted with state sovereignty with respect to border control. Public interest is conceptualised as the state's interest in controlling immigration. The margin of appreciation is usually wide in both case groups, although the breadth varies depending on the issue, but it concerns different factors.[15] Child protection cases are also characterised by a need to respond to the child's situation quickly, which is not a prominent feature in immigration cases.

Consequently, this article does not claim that the assessment of best interests in child protection and immigration cases should be identical. Nevertheless, questions about whether an interference in family life is justified and whether a child can be separated from her parents are relevant to both case groups. Therefore, the comparison explores whether the same rights are approached differently depending on the case group and whether the weight of best interests varies. While the current human rights system allows differential treatment based on immigration status,[16] it is important to highlight the implications of this differentiation and to raise the question whether positioning human rights limits differently to such an extent is acceptable in light of the underlying principles of human rights. It has been argued that the oft-repeated idea that a state has, according to well-established international law, the right to control the entry of non-nationals into its territory, is not necessarily that well-founded or well-established.[17] Marie-Bénédicte Dembour has shown that the 'Strasbourg reversal' – the way that Strasbourg migrant case law frequently privileges state sovereignty over migrants' rights – is problematic from a human rights perspective.[18]

Comparing different case groups is especially important where children are concerned. In the CRC, the obligation to consider best interests extends to all decisions concerning children. Children are children regardless of their immigration status (or the immigration status or conduct of their parents), and possible discrepancies in the level of protection in different contexts merit scrutiny. Improving argumentation related to best interests is an essential step towards more child-friendly jurisprudence.

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13 See, eg, H Heiskanen, *Towards Greener Human Rights Protection. Rewriting the Environmental Case-Law of the European Court of Human Rights* (Tampere University Press, 2018), 41–69. Analysing admissibility decisions is beyond the scope of the article, but would be important to obtain a more comprehensive view.

14 *Gnahoré v France* (Application No 40031/98) (2002) 34 EHRR 967, joint partly dissenting opinion of Judges Tulkens and Loucaides.

15 According to the doctrine of the margin of appreciation, states have certain leeway in how rights are balanced. See, eg, G Letsas, 'Two Concepts of the Margin of Appreciation' [2006] 26(4) OJLS 705.

16 To an extent, differential treatment is embedded in the Strasbourg system. Although migrants are not excluded from the ambit of the European Convention, they were not granted specific rights either. See M Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP, 2015), 35–61.

17 In ECtHR case law, the principle first appeared in the first Strasbourg migrant case *Abdulaziz, Cabales and Balkandali v United Kingdom* (Application Nos 9214/80, 9473/81, 9474/81) (1985) 7 EHRR 471, [67]; B Schotel, *On the Right of Exclusion: Law, Ethics and Immigration Policy* (Routledge, 2012); Dembour, above n 16, 4–5, 117, 127–129.

18 Dembour, above n 16, 117–118; see also T Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11 EJML 271, 292.

Previous research has shown that the court treats immigration matters as a distinct context in which people can legitimately be treated less favourably. According to Geraldine Van Bueren, the protection that the ECtHR offers children and family life is arguably at its weakest in immigration cases.[19] In 1999, Ursula Kilkelly observed that, with some exceptions, ECtHR jurisprudence in immigration cases lacks the child focus evident in all other Article 8 areas.[20] An important question considered in this article is whether the court has changed its approach.

The following sections analyse the most important elements that the court connects to the best interests of the child in child protection and immigration cases. Physical integrity in child protection cases and ties with the host country or country of origin in immigration cases are discussed first. The article then compares the case groups. The most remarkable differences relate to how the court assesses family unity, the child's age, and the child's views.[21]

Characteristics of child protection and immigration cases before the ECtHR

At the outset, the research for this article was not limited to a certain right or provision of the European Convention. However, all of the cases examined concern the right to respect for private and family life (Article 8), which is why a violation refers in this article to a violation of Article 8. The prerequisite for an application to be considered under Article 8 is the existence of private or family life. Article 8 can be limited by certain criteria: limitations must be in accordance with the law, serve a legitimate aim, and be necessary in a democratic society. The respondent state rarely contests that taking a child into care or expelling a parent constitutes an interference.[22] Similarly, the criterion of being in accordance with the law is usually satisfied easily. Protecting the best interests of the child – the reason for interference in child protection cases – is a legitimate aim since the list of acceptable aims in Article 8 contains the 'rights and freedoms of others'. In immigration cases, aims such as the economic well-being of the state or national security are also considered legitimate. Whether a limitation is necessary in a democratic society requires more scrutiny, and best interests are usually discussed at this stage of argumentation.

The earliest child protection case with a reference to best interests was decided in 1996,[23] whereas the earliest immigration case dates to 2006.[24] Despite being the first child protection judgment where best interests are explicitly referred to, *Johansen* relies on earlier case law to justify why best interests are an acceptable basis for intervening in family life. Indeed, the language of best interests has not necessarily led to a major change in the child-specific factors that the court assesses; according to established case law, '[t]he mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life'.[25]

In both case groups, the ECtHR has emphasised the importance of best interests and referred to the 'broad consensus, including in international law, that in cases concerning children their best

19 G Van Bueren, *Child rights in Europe. Convergence and divergence in judicial protection* (Council of Europe Publishing, 2007), 123.

20 U Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate, 1999), 219–221.

21 Similarly, see C Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's use of the Principle?' (2015) 17 EJML 70, 75. Also, M Leloup, 'Some Reflections on the Principle of the Best Interests of the Child in European Expulsion Case Law', in W Benedek et al (eds), *European Yearbook on Human Rights* (Intersentia, 2018), 401.

22 First-entry cases are more controversial since the European Convention does not encompass a general obligation to respect a married couple's choice of residence, see *Abdulaziz*, above n 17, [68]. The distinction between first-entry and expulsion cases has been criticised, see M Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP, 2010), 270.

23 *Johansen v Norway* (Application No 17383/90) (1997) 23 EHRR 33.

24 *Da Silva v Netherlands* (Application No 50435/99) (2006) 44 EHRR 729.

25 *W v United Kingdom* (1988) 10 EHRR 29, [59]. For immigration cases, see Smyth, above n 21, 74.

interests have to be paramount'.[26] Interestingly, formulations used by the ECtHR are often stronger than in Article 3(1) CRC, which provides that best interests must be 'a' – not 'the' – primary consideration. The ECtHR has described children's interests as 'overriding',[27] 'paramount',[28] 'superior',[29] and 'determining',[30] but it has also used less obliging formulations, such as 'the Court will attach particular importance to the best interests of the child which, depending on their nature and seriousness, may override those of the parent'.[31] Often, however, there is a mismatch between the obliging vocabulary and the weight accorded to best interests. The court often emphasises best interests but does not always identify factors to be considered in applying the concept or what weight should be attached to each factor to ensure compatibility with Article 8.[32]

Child protection

In the majority of child protection cases in which the ECtHR has referred to best interests, the child has been taken into public care. Challenges usually concern the alleged unjustified nature of a care order or further restrictions, which perhaps reflects the fact that the state's main duty in the context of child protection is a negative one, although some allege omissions by national authorities.[33] The application may concern different aspects of the care proceedings, which are separately assessed. The first aspect is the legitimacy of taking the child into care. The second is the procedure: in child protection cases, the court considers that Article 8 has a procedural limb, requiring that decision-making procedures be fair and all parties be given a possibility to be heard or otherwise sufficiently involved. The third aspect concerns the period that the child has been in care, often with contact restrictions. The fourth concerns the refusal to end public care.[34]

The ECtHR has acknowledged that identifying the child's best interests requires courts to weigh numerous factors, but an exhaustive list has not been created because the factors vary so much.[35] Many child protection cases reflect a connection between best interests and physical integrity. If a conflict arises between maintaining family ties and ensuring development in a safe and secure environment, the latter tends to prevail.[36] In verdicts of violation, dissenters have often criticised the majority for not giving sufficient weight to the child's interests.[37] An

26 For example, *Akinnibosun v Italy* (Application No 9056/14) 16 July 2015, [65]; *Jeunesse v Netherlands* (Application No 12738/10) (2014) 60 EHRR 789, [109]; *R and H v United Kingdom* (Application No 35348/06) 31 May 2011, [73]–[74].

27 *Bronda v Italy* (Application No 22430/93) (2001) 33 EHRR 81, [62].

28 *Berisha v Switzerland* (Application No 948/12) 30 July 2013, [50].

29 *M and C v Romania* (Application No 29032/04) 27 September 2011, [128].

30 *Soares de Melo v Portugal* (Application No 72850/14) 16 February 2016, [91].

31 *Assunção Chaves v Portugal* (Application No 61226/08) 31 January 2012, [101].

32 Kilkelly, above n 20, 201–202; two decades later, these observations still hold true. See also R Taylor, 'Putting children first? Children's interests as a primary consideration in public law' [2016] 28 CFLQ 45.

33 See, eg, *MP and Others v Bulgaria* (Application No 22457/08) 15 November 2011, where a father and a son alleged that authorities should have removed the son from his home where he was likely to continue to be a victim of sexual abuse. The ECtHR, in finding a non-violation of Articles 3 and 8, emphasised that numerous reports showed no indication of abuse, actually the contrary, and that the domestic courts had relied on substantial expert evidence.

34 In addition, applications sometimes concern situations where the child has been declared available for adoption after public care not approved by the parents has taken place. The mechanism of involuntary adoption does not exist in all contracting states to the European Convention, and in some states, it is hardly used. See M Skivenes and Karl Søvig, 'Judicial discretion and the child's best interests: the European Court of Human Rights on adoptions in child protection cases' in E Sutherland and L Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child* (CUP, 2016), 347.

35 *YC v United Kingdom* (Application No 4547/10) [2012] 2 FLR 332, [135].

36 Ibid, [146].

37 *EP v Italy* (Application No 31127/96) (2001) 31 EHRR 463, partly dissenting opinion of Judge Bonello; *Johansen*, above n 23, partly dissenting opinion of Judge Morenilla.

important principle repeated in several cases is that a parent is not entitled to take measures that would harm the child's health and development.[38]

The court has been reluctant to find a violation because of the act of taking the child into public care when abuse or suspicions of abuse have occurred, invoking the 'obviously paramount interest' of protecting the child from a parent suspected of physical abuse.[39] Conversely, the fact that allegations of mistreatment have not been presented during the procedure has led the court to conclude that the act of taking into care has violated Article 8.[40] Expert evidence plays an important role in demonstrating abuse and in indicating whether meeting the parents is harmful.[41]

In unclear situations, it is better to be careful. The court, for instance, regarded a care order as justified in a situation where it was issued after one of the applicant parents' children had been injured. Since the applicants had not proven that the injury was caused by an accident, national authorities could reasonably have considered that placing the children in public care for some time was in the children's best interests.[42] The same approach applies to contact restrictions and ending public care, although the margin of appreciation is narrower concerning decisions that restrict relationships further.[43] In *Jovanovic*, the applicant's son suffered from brain bleeding with lifelong consequences. The ECtHR found that, since it was unclear who had caused the injuries, the authorities had good grounds for keeping the child in public care. The parents had, at the least, failed to protect the child.[44] Similarly, sexual abuse or allegations of sexual abuse, even if not confirmed by a judicial finding, diminish the probability of the court finding a care order to constitute a violation. In such situations, the court has held that the placement or contact restrictions are in the child's best interests.[45]

Immigration

In immigration cases, best interests do not have an elevated status. The ECtHR usually emphasises that Article 8 does not establish a general obligation to respect immigrants' choice of residence or allow family reunification.[46] The court has explained that in cases concerning family reunification, it pays particular attention to the circumstances of the children concerned, especially their age, their situation in the country or countries concerned, and the extent to which they are dependent on their parents.[47] Best interests have been decisive in some cases, but the impact on children of decisions concerning parents is often under-rated or little discussed.[48] As Ciara Smyth has noted, considering a diversity of factors is appropriate: the Committee on

38 *Kocherov and Sergeyeva v Russia* (Application No 16899/13), 29 March 2016, [95]; *Buchberger v Austria* (Application No 32899/96) (2003) 37 EHRR 356, [40].
39 *Gnahoré*, above n 14, [56]–[57].
40 *Barnea and Caldararu v Italy* (Application No 37931/15) 22 June 2017, [74].
41 *MP*, above n 33, [117]–[118]; *M and M v Croatia* (Application No 10161/13) [2016] 2 FLR 18, [186]–[187].
42 *Ageyevy v Russia* (Application No 7075/10) (2013) 34 BHRC 449, [130]–[132].
43 *V v Slovenia* (Application No 26971/07) [2012] 2 FCR 132, [81]–[85]; *Dolhamre v Sweden* (Application No 67/04) [2010] 2 FLR 912, [107]–[119].
44 *Jovanovic v Sweden* (Application No 10592/12) 22 October 2015, [78]–[85].
45 *Clemeno and Others v Italy* (Application No 19537/03) 21 October 2008; *Errico v Italy* (Application No 29768/05) 24 February 2009; *HK v Finland* (Application No 36065/97) (2008) 46 EHRR 113; *KA v Finland* (Application No 27751/95) [2003] 1 FLR 696; *Covezzi v Italy* (Application No 52763/99) (2004) 38 EHRR 603; *Scozzari and Giunta v Italy* (Application Nos 39221/98 and 41963/98) [2000] 2 FLR 771; *Roda and Bonfatti v Italy* (Application No 10427/02) 21 November 2006; *L v Finland* (Application No 25651/94) [2000] 2 FLR 118.
46 See, eg, *Tanda-Muzinga v France* (Application No 2260/10) 10 July 2014, [65].
47 *Jeunesse*, above n 26, [118].
48 See, eg, *AW Khan v United Kingdom* (Application No 47486/06) 12 January 2010; *Kaya v Germany* (Application No 31753/02) 28 June 2007. In *Kaya*, the applicant's child was deliberately ignored since the child had been born after the final domestic decision.

the Rights of the Child has itself drafted a list of elements to be taken into account when assessing best interests. What the ECtHR infers from different factors, however, varies significantly.[49]

Immigration cases can be divided into first-entry cases, where the applicant has never been admitted to the state, and expulsion cases, where the applicant has a right to reside but faces a threat of deportation. First-entry cases can be further divided into cases concerning literal first-entry and those in which the persons concerned have already resided in the host state without a valid residence permit. First-entry and expulsion cases have different implications for the right to respect for family life. In first-entry cases, the emphasis is on positive obligations, allowing the establishment of family life. In expulsion cases, negative obligations, not interfering with family life, are accentuated. Although the distinction between positive and negative obligations is not always clear,[50] the ECtHR applies somewhat different tests in expulsion and first-entry cases.

In *Üner*, the court complemented a previous list of criteria for assessing whether deportation of a non-national parent breaches Article 8 with 'the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled'.[51] The *Üner* judgment demonstrates problems related to the criteria because the court disagreed on their interpretation.[52] Another set of criteria used in expulsion cases applies to young adults with no family of their own. These '*Maslov* criteria' include the nature and seriousness of the offence, length of stay in the country, time elapsed after the offence and conduct since, solidity of social, cultural, and family ties with the host country and with the country of destination, and duration of the exclusion order. The obligation to have regard to best interests applies both if the person to be expelled is a minor and if the person is no longer a minor but the reason for the expulsion lies in offences committed while a minor. There is 'little room for justifying an expulsion of a settled migrant on account of mostly non-violent offences committed when a minor'.[53]

In first-entry cases, the court usually applies the obstacles test or the exceptional circumstances test and sometimes the reasonableness test. In the obstacles test, the state is regarded as exceeding its margin only if there are 'insurmountable obstacles' to establishing family life in the country of origin or elsewhere. The obstacles test does not apply to the family reunification of refugees because they cannot lead family life 'elsewhere'. In such cases, the court has underlined that applications for family reunification need to be examined with flexibility and humanity.[54] In the exceptional circumstances test, the court assesses whether exceptional circumstances exist that would lead to a violation in the case of expulsion. The reasonableness test, which focuses on whether family reunification is the most adequate means of developing family life, may be more favourable for the applicant.[55]

In immigration cases, the court assesses seriously the child's ties with the respondent state and the country of deportation or origin. Nationality has some significance in the assessment of ties. In *Kamenov*, a deportation case, the court considered 12- and 14-year-old daughters who were

49 Smyth, above n 21, 85; CRC/C/GC/14, [52]–[79].

50 See, eg, Chamber judgment of *Paposhvili v Belgium* (Application No 41738/10), 17 April 2014, [138]; *Jeunesse*, n 26 above, [106].

51 *Üner v Netherlands* (Application No 46410/99) (2006) 45 EHRR 421, [58].

52 *Üner*, ibid, joint dissenting opinion of Judges Costa, Zupančič and Türmen.

53 *Maslov*, above n 9, [68]–[76]; *Külecki v Austria* (Application No 30441/09) 1 June 2017, [39].

54 *Tanda-Muzinga*, above n 46, [68]–[82]; *Mugenzi v France* (Application No 52701/09) 10 July 2014, [54]–[56]. In both cases, the children had been denied visas, and a violation was found because of procedural shortcomings including the length of the procedure. The authorities had questioned the genuineness of family ties in *Tanda-Muzinga* and the ages of the children in *Mugenzi*.

55 Smyth, above n 21, 93–94.

Russian nationals, had never lived in Kazakhstan, and had no ties to the country. Although it concluded that their 'resettlement would mean a radical upheaval', best interests were not decisive in finding a violation.[56] A violation was also found in a case where the Nigerian father of twin daughters, who had Swiss and Nigerian nationality, faced expulsion. The court held that it was in the daughters' best interests to grow up with both parents and that the children and the Swiss mother, who was no longer in a relationship with the father, 'could hardly be obliged' to settle in Nigeria.[57] On the other hand, a one-year-old Swiss national was considered able to integrate because of his young age when his mother was expelled.[58] The court has sometimes argued that possessing the nationality of the respondent state allows the children to return regularly if their parent is deported.[59] The court has also recognised that children were nationals of the country of expulsion and that it did not 'appear arbitrary to accept' that the presence of the parents, as well as other relatives, would alleviate their integration difficulties.[60]

Integration in the host state has led to judgments in the applicant's favour, especially concerning juvenile offenders. In *Maslov*, the Grand Chamber held that very serious reasons are required to justify the expulsion of aliens who have lawfully spent most of their childhoods in the host country. The court noted that the obligation to consider the best interests of the child includes an obligation to facilitate reintegration, an aim that should be pursued by the juvenile justice system, according to Article 40 CRC. That aim 'will not be achieved by severing family or social ties through expulsion, which must remain a means of last resort'.[61] It is notable that the ECtHR connected best interests to the relevant CRC right in *Maslov*.

In first-entry cases, integration is assessed more strictly. In *Berisha*, the applicants' children had entered the respondent state clandestinely to live with their parents, who then applied for family reunification. At the time of the judgment, the children had been living in Switzerland for four years and were 10, 17, and 19 years old. The court considered that while they were well integrated, the stay was not long enough, and solid social and linguistic ties to the home country must still exist. In addition, their grandmother, who had looked after them for over two years, was still living in Kosovo, demonstrating the strength of family ties.[62]

The discrepancies in how family unity is assessed

Different default position

The ECtHR's starting point in child protection cases is that it is in the best interests of the child to grow up in her original family, which is why the threshold for taking a child into care is high. This starting point originates from the right to respect for family life and follows the logic of Article 9 CRC, which outlines that States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when necessary for the best interests of the child.

On the other hand, the ECtHR is reluctant to find a violation because of the care order itself. Once national authorities have considered it necessary to take a child into care, or to prolong the care or impose contact restrictions,[63] the court usually trusts that assessment because of

56 *Kamenov v Russia* (Application No 17570/15) 7 March 2017, [40].
57 *Udeh v Switzerland* (Application No 12020/09) 16 April 2013, [52].
58 *Kissiwa Koffi v Switzerland* (Application No 38005/07) 15 November 2012, [68].
59 *Onur v United Kingdom* (Application No 27319/07) (2009) 49 EHRR 1057, [60].
60 *Salija v Switzerland* (Application No 55470/10) 10 January 2017, [50].
61 *Maslov*, above n 9, [78]–[84]. See also *Külecki v Austria*, above n 53, [41]; *AA v United Kingdom* (Application No 8000/08) 20 September 2011, [60].
62 *Berisha*, above n 28, [60].
63 *Dolhamre*, above n 43.

subsidiarity and the margin of appreciation. Authorities, however, carry the burden of proof, having to demonstrate that they have proved the family unfit, acted diligently, and made sufficient efforts to preserve ties.[64]

According to the ECtHR, two factors must be considered in identifying the child's best interests in child protection cases. Firstly, the child's ties with her family should be maintained except when the family has proved particularly unfit. Secondly, the child should develop in a safe and secure environment.[65] Severing all ties between the parent and child cuts the child from her roots and can only be justified in exceptional circumstances or by the 'overriding requirement' of the child's best interests.[66] Best interests have a 'double role',[67] or are 'seen to comprise two limbs'.[68] Best interests are usually realised as protected by Article 8 when the child lives with her parents. However, they also justify interfering with family life because under no circumstances is a parent entitled to harm the child's health and development.[69]

In child protection cases, the ECtHR has often approached best interests through negation, by listing circumstances that cannot be considered as in the best interests of the child. These include physical abuse, sexual abuse, shortcomings in care or state of health, and parents' mental instability, among other things. Without allegations regarding the parents' ability to care for the children, economic reasons were considered an insufficient justification for a care order.[70] Similarly, without allegations of abuse, a care order because of circumstances at home and alleged neglect was not considered necessary.[71] When a care order had been issued because the applicant father allegedly had alcohol problems, was largely dependent on social benefits, and the home had no electricity, the court found the reasons for removal relevant but not sufficient; here, too, no allegations of abuse had been made.[72] Conversely, in a case where national authorities had good reason to be concerned and home conditions were not the sole reason for placement, a temporary placement of the applicants' seven children was considered in their best interests and in accordance with Article 8.[73] In another case, the parents' limited intellectual capacities were not an acceptable justification for public care in the absence of sufficient consideration of alternative measures.[74]

Approaching best interests through negation has advantages from the original family's perspective. When assessing whether something is *against* the best interests of the child, the ECtHR may treat the family more fairly. According to the ECtHR, the fact that a child could be placed in a more beneficial environment will not alone justify a removal from biological parents; other circumstances must exist pointing to the necessity of the measure.[75] Unless child protection authorities are responding to an immediate risk, removal has not been found to be justified before other, less restrictive, measures have been taken. Authorities must demonstrate that they have considered less restrictive alternatives and fulfilled their positive obligations by

64 *Lyubenova v Bulgaria* (Application No 13786/04) 18 October 2011; *Zhou v Italy* (Application No 33773/11), 21 January 2014; *Vautier v France* (Application No 28499/05) 26 November 2009; *Achim v Romania* (Application No 45959/11) 24 October 2017; *Akinnibosun*, above n 26.
65 *Gnahoré v France*, above n 14, [59]; *T v the Czech Republic* (Application No 19315/11) 17 July 2014, [112].
66 *HK v Finland*, above n 45, [110].
67 *Schmidt v France* (Application No 35109/02) 26 July 2007, [82].
68 *Gnahoré v France*, above n 14, [59].
69 *Johansen*, above n 23, [78].
70 *Wallová and Walla v the Czech Republic* (Application No 23848/04) 26 October 2006, [67]–[79].
71 *Soares de Melo*, above n 30, [118]–[123].
72 *Havelka and Others v the Czech Republic* (Application No 23499/06) 21 June 2007, [57].
73 *Achim*, above n 64, [105]; cf *Couillard Maugery v France* (Application No 64796/01), 1 July 2004, [259]–[269]; cf *Haase v Germany* (Application No 11057/02) [2004] 2 FLR 39 where an emergency intervention breached Article 8.
74 *Kutzner v Germany* (Application No 46544/99) (2002) 35 EHRR 25, [70]–[82].
75 *KA*, above n 45, [92]; *Kutzner*, ibid, [69]; *Akinnibosun*, above n 26, [61]; *Havelka*, above n 72, [56].

supporting families. The court has taken the strictest stance towards emergency care orders carried out without the parents' involvement.[76]

Family unity is not similarly privileged in immigration cases, other than those concerning refugees. For refugees, the court has noted that family unity is an essential right and family reunification is fundamental to allowing persons fleeing from persecution to lead a normal life.[77] In other immigration cases, the ECtHR does not assume that living with the parents is in the best interests of the child. Instead, the court usually questions the ties between the parent and the child and assesses separately whether cohabitation with the parent is in the child's best interests at all. The court has, for example, held that 'it does not emerge that the third applicant [child] had any special care needs or that her mother would be unable to provide satisfactory care on her own'.[78] Similarly, it decided that there was 'no presumption' that reuniting the applicant child with the applicant father was 'per se' in his best interests.[79] While exceptions to this rule exist,[80] usually the nature of the relationship is an important factor when assessing whether refusal of entry or expulsion would be against the best interests of the child. If ties are assessed to be close, contact with both parents is favoured, which follows the logic of Article 9 CRC. Article 9 CRC, however, prohibits separation from both parents. Separation from one parent, if not required for the best interests of the child, breaches Article 9 CRC.

The expression 'exceptional circumstances' illustrates how differently the court assesses family unity in immigration cases. In child protection cases, family ties can be severed only in exceptional circumstances. In immigration cases, only in exceptional circumstances can a violation be found. In this respect, immigration case law can be criticised for inconsistency, since certain circumstances have been considered exceptional in some cases, such as *Jeunesse* and *Kaplan*, but not in others, such as *Antwi*. *Antwi* was an expulsion case where the deportee was a father with no criminal past other than violations of immigration rules – he had been granted a residence permit on the basis of a false identity. The court acknowledged that the father had an important role in the daily care and upbringing of his ten-year-old daughter, a Norwegian national. However, it held that no insurmountable obstacles prevented the applicants from settling in Ghana and the child had no special care needs. According to the court, no exceptional circumstances were present, and sufficient weight had been attached to the child's best interests in ordering the expulsion.[81]

The Grand Chamber case of *Jeunesse* concerned the refusal of a residence permit to a mother who had three children, all Dutch nationals, and had stayed in the Netherlands for a long time without a valid residence permit. She explicitly relied on the fact that the national decision was not in accordance with Article 3 CRC. The circumstances were exceptional because of the best interests of the children; the court considered it obvious that their interests would be best served if they continued to live with their mother, since she was the primary carer. While the national authorities had had 'some regard' for the children, the court was not convinced that 'actual evidence on such matters was considered and assessed'. There were additional factors in the applicant's favour, but best interests were decisive in finding a violation.[82] Best interests were

76 *Todorova v Italy* (Application No 33932/06) 13 January 2009; *Haase*, above n 73; *P, C and S v United Kingdom* (Application No 56547/00) [2002] 2 FLR 631; *K and T v Finland* (Application No 25702/94) [2001] 2 FLR 707.

77 *Tanda-Muzinga*, above n 46, [75].

78 *Antwi and Others v Norway* (Application No 26940/10) 14 February 2012, [99].

79 *El Ghatet v Switzerland* (Application No 56971/10) 8 November 2016, [50]; however, a violation was found because of domestic courts' procedural failure to consider best interests.

80 *Kolonja v Greece* (Application No 49441/12) 19 May 2016, [56] where the court acknowledged that the likely consequence of the deportation would be that the child would grow up separated from his father, even though growing up with both parents would be in his best interests; however, the case was overall weak from the state's point of view.

81 *Antwi*, above n 78, [87]–[105]; cf dissenting opinion of Judge Sicilianos, joined by Judge Lazarova Trajkovska.

82 *Jeunesse*, above n 26, [100]–[123].

also decisive in *Kaplan*, a similar case to *Antwi*, except that the reason for expulsion was criminal convictions and the youngest of the applicant father's three children was autistic. The court was not 'convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the child'.[83]

Jeunesse and *Kaplan* were concluded after *Antwi*. Later cases are divided as to whether best interests are accorded a more significant role. *Kaplan* has been referred to in one other case, which led to a finding of a violation.[84] *Jeunesse* has been cited to emphasise national decision-making bodies' duty to 'advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it'.[85] In some cases, the court has recognised the importance of best interests but concluded that 'in the context of the removal of a non-national parent as a consequence of a criminal conviction, the decision first and foremost concerns the offender' and that the nature and seriousness of the offence or offending history may outweigh other criteria,[86] even that 'a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there'.[87] This argumentation formally acknowledges the importance of best interests, but the real purpose of referring to *Jeunesse* seems to be to emphasise the case as an exception, not a new rule.[88]

Preserving ties: privileged or not

One key aspect of family unity, that of preserving ties between family members, is reflected in the child protection jurisprudence. Case law relating to contact restrictions demonstrates that if a child cannot live with her family, being in contact with parents and siblings and preserving family ties to the extent possible is generally in her best interests. The margin for imposing further limitations for a child taken into care is narrower than the margin for taking a child into care.[89] Nevertheless, even severe contact restrictions or placement in an external foster home, rather than with relatives, may be in the child's best interests, in providing a stable and secure environment.[90] Even an emergency care order, foster care, and the subsequent severing of legal ties leading to adoption do not necessarily violate Article 8.[91]

The court's attitude towards ending public care highlights the importance it places on preserving ties. In principle, a care order should be regarded as a temporary measure and implemented with the ultimate aim of reuniting the parent and child.[92] National authorities have a duty to reassess the situation regularly, and this duty weighs with progressively increasing force from the commencement of the period of care, 'subject always to its being

83 *Kaplan v Norway* (Application No 32504/11) 24 July 2014, [81]–[99].
84 *Guliyev and Sheina v Russia* (Application No 29790/14) 17 April 2018, [57].
85 *Ejimson v Germany* (Application No 58681/12) 1 March 2018, [57] (no violation); see also *Ustinova v Russia* (Application No 7994/14) 8 November 2016, [42] (violation); *Kolonja*, above n 80 (violation), [47]; *Sarközi and Mahran v Austria* (Application No 27945/10) 2 April 2015, [64] (no violation).
86 *Assem Hassan Ali v Denmark* (Application No 25593/14) 23 October 2018, [55]–[56] (no violation); *Krasniqi v Austria* (Application No 41697/12) 25 April 2017, [47]–[48] (no violation); *Salem v Denmark* (Application No 77036/11), 1 December 2016, [75]–[76] (no violation).
87 *Kamenov*, above n 56, [25] (violation because of other reasons).
88 There are, however, undercurrents (a term used by Dembour, above n 16, 19); see concurring opinion of Judge Pinto de Albuquerque in *Biao v Denmark* (Application No 38590/10) (2017) 64 EHRR 1, suggesting that the court could have criticised the insufficient weight of best interests, as in *Jeunesse*.
89 *R v Finland* (Application No 34141/96) [2006] 2 FLR 923, [90]; *TP and KM v United Kingdom* (Application No 28945/95) [2001] 2 FLR 549, [71].
90 *K and T*, above n 76; *Levin v Sweden* (Application No 35141/06) [2012] 1 FCR 569; *ML v Norway* (Application No 43701/14) 7 September 2017.
91 *Strand Lobben and Others v Norway* (Application No 37283/13) [2018] 2 FLR 269, referred to the Grand Chamber.
92 Ibid, [105].

balanced against the duty to consider the best interests of the child'. Furthermore, '[a]fter a considerable period of time has passed since the child was originally taken into public care, the interest of a child not to have his or her *de facto* family situation changed again may override the interests of the parents to have their family reunited'.[93] When the court has been persuaded that national authorities will continue to support the relations between the parents and children, it is less likely that a violation will be found.[94] If the biological family does not visit a child who has been taken into care, it may be argued that not returning to them is in the child's best interests.[95]

The court has been strictest when the child–parent connection, or connection between siblings, has been completely severed. In *EP*, a mother complained about the adoption of her daughter following a period in foster care. The court noted that even though the mother demonstrated obsessive medical care towards her daughter and acted impulsively, the contact ban should not have been total and meetings should have been arranged.[96] In *SH*, the applicant's children had been taken into care and then declared available for adoption after incidents of ingesting medication. Experts had been in favour of preserving family ties, and the parents claimed to be capable of caring for the children with assistance. The court found that safeguarding both the child's best interests and ties with the mother would have been possible. Furthermore, the three children had been placed in different families, leading to the severing of sibling ties. The court seems to have searched for the best solution for the children; adoption was in their interests, but living in the biological family was a better alternative. The key reason for finding a violation was the national authorities' failure to explore other options.[97]

In immigration cases, the applicant is often expected to prove that ties are strong or that best interests should weigh in the assessment.[98] In *AH Khan*, the applicant had not seen his six children for 11 years because of his imprisonment. The court held that, given the time that had passed and the lack of evidence of a 'positive relationship' between them, the applicant had not 'established that his children's best interests were adversely affected by his deportation'.[99] The judgment seems reasonable but it also raises questions as to how an imprisoned parent can prove the existence of ties without a possibility to meet the children.[100] In *MPEV*, the applicant father was able to prove his central role in the family; he had raised his daughter with his ex-spouse and had extensive contact rights. Best interests seem to have been decisive in finding a violation, though the moderate nature of the crimes and the child's integration pointed towards the same outcome.[101] The burden also falls on the applicant to prove that contact cannot be maintained over the phone or internet. The court has on several occasions considered that deportation does not rupture the parent–child relationship because the children can remain in the respondent state and maintain contact through visits and telecommunication.[102]

The court's assessment of whether separation is against the child's best interests is also affected by whether the parent and child have been living together before the expulsion. If a separation has occurred because of imprisonment or other reasons, the court is more likely to conclude

93 *KA*, above n 45, [138]; see also *RMS v Spain* (Application No 28775/12) 18 June 2013, [71]; *Haase*, above n 73, [93].
94 *Mircea Dumitrescu v Romania* (Application No 14609/10) 30 July 2013, [83]–[84].
95 *Zambotto Perrin v France* (Application No 4962/11) 26 September 2013, [101].
96 *EP*, above n 37, [63]–[65].
97 *SH v Italy* (Application No 52557/14) 13 October 2015, [43]–[58]; in *Soares de Melo*, above n 30, [114], placing siblings in three different institutions was also against their interests.
98 *Shakurov v Russia* (Application No 55822/10) 5 June 2012, [201]–[203].
99 *AH Khan v United Kingdom* (Application No 6222/10) 20 December 2011, [40].
100 See also *Salem*, above n 86, [78].
101 *MPEV and Others v Switzerland* (Application No 3910/13) 8 July 2014, [52]–[59]; see also *Zakayev and Safanova v Russia* (Application No 11870/03) 11 February 2010, [45].
102 *Salija*, above n 60, [50]; *Onur v United Kingdom*, above n 59, [59]; *Krasniqi*, above n 86, [53]; *Külecki*, above n 53, [49]; cf *Kamenov*, above n 56, [40].

that separation is not against best interests and that physical contact is not needed in the future.[103] A brief period of living together has not changed the assessment.[104] In *ME*, the court took into account the applicant father's two children but added that it 'cannot overlook' his very limited contact with them.[105] A different approach was taken in *Osman* concerning a refusal to reinstate the applicant's residence permit; the applicant, a minor at the time of the events, had not seen her mother for four years. However, the court held that this could be explained by 'practical and economical restraints, and can hardly lead to the conclusion that the applicant and her mother did not wish to maintain or intensify their family life together'.[106]

In cases of parental separation where the parent susceptible to expulsion or seeking regularisation does not have care of the child but a contact arrangement exists, the court is more likely to conclude that exclusion is against the child's best interests. Because the children will remain in the host state, the court cannot consider whether their best interests would involve moving elsewhere.[107] However, best interests can be outweighed by factors related to crime.[108] In *Udeh*, the applicant father had spent long periods in prison and had very limited contact rights. Parental divorce contributed to deciding the case in the applicant's favour, the court finding that growing up with both parents was in the daughters' best interests and the only way to maintain regular contact between the father and daughters was to allow him to remain.[109] In *Da Silva*, the court assessed whether a Surinamese mother who had resided illegally in the Netherlands should be allowed to continue residing there with her Dutch daughter. Parental authority had been awarded to the Dutch father, and refusing to allow the mother to stay would separate her from the daughter. In the custody proceedings, the national courts – following the advice of the child welfare authorities – assessed that it was in the three-year-old daughter's best interests to stay, which seems to have been decisive in finding a violation, combined with evidence that the mother was the primary carer.[110] In *Nunez*, the best interests of the applicant's daughters, aged eight and nine, were also decisive when the mother faced expulsion. The mother's interests were not sufficient to constitute a breach of Article 8; she had violated immigration rules and had never had a legitimate basis to reside. Yet 'particular regard to the children's best interest' changed the situation. As the daughters' father had custody, they would remain in Norway, but they had been living for a long period with the applicant. The children had experienced stress because of the situation, and even after the two-year entry ban, it was uncertain whether they would see the mother. A two-year separation was 'a very long period for children of the ages in question'. Hence, the court was not convinced that, in the 'concrete and exceptional circumstances of the case', sufficient weight had been attached to best interests.[111]

A pattern becomes apparent when contrasted with cases where parents are together. In *Kissiwa Koffi*, the court held that the applicant mother's Swiss husband could join his expelled wife in Ivory Coast, also his country of origin, even though he had two other children in Switzerland, where he had resided for about 20 years. The court considered it significant that the mother

103 *Onur v United Kingdom*, above n 59, [59]; *Joseph Grant v United Kingdom* (Application No 10606/07) 8 January 2009, [40]. Cf *Omojudi v United Kingdom* (Application No 1820/08) 24 November 2009, where the family had been living together before the deportation.
104 *Üner*, above n 51, [62].
105 *ME v Denmark* (Application No 58363/10) 8 July 2014, [76]–[83].
106 *Osman v Denmark* (Application No 38058/09) (2015) 61 EHRR 10, [74].
107 Smyth, above n 21, 98–99; M Leloup, 'The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency' (2019) 37 NQHR 50, 59.
108 *Chair and JB v Germany* (Application No 69735/01) 6 December 2007, [66]–[67].
109 *Udeh*, above n 57, [52].
110 *Da Silva*, above n 24, [40]–[44].
111 *Nunez v Norway* (Application No 55597/09) (2014) 58 EHRR 17, [71]–[84].

had left behind another child in Ivory Coast.[112] In *Antwi*, where the deportee was male, the court held that since both parents were raised in Ghana, there were 'no insurmountable obstacles in the way of the applicants settling together in Ghana or, at the least, to maintaining regular contacts'. The mother was a Norwegian citizen, employed in Norway, but the court still considered that no particular obstacles prevented her from accompanying her deported husband.[113] Although no definitive conclusions can be made based on a small number of cases, the emphasis on origin in *Kissiwa Koffi* and *Antwi* raises concerns about discrimination.[114]

Moreover, cases like *Rodrigues da Silva* and *Nunez* call into question whether the court values the child's connection with the mother more than with the father. The court seems to require fathers to prove more fully their involvement in family life and more readily accepts that fathers can maintain contact via technology. In addition, the parents' relationship status has a significant role in immigration cases but not in child protection cases. From the perspective of child, this appears arbitrary.

Young age: care needs or adaptability

The child's age is relevant in both child protection and immigration cases. In child protection cases, the court has paid attention to the importance of protecting family unity, especially where young children are concerned. The court recently referred to the General Comment on young children, indicating that early childhood is a critical period for the realisation of rights safeguarded by the CRC and that 'young children are reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect their well-being, while taking account of their views and evolving capacities'.[115]

In child protection cases, the court has also recognised that time is crucial as a prolonged rupture of contact can have irreparable consequences on relations between a parent and very young child.[116] Regarding a child taken into care as a three-year-old, the court noted that 'the breaking-off of contact with a very young child may result in the progressive deterioration of the child's relationship with his or her parent'.[117] If considerable time has passed since the child was taken into public care, protection of the new family life may take priority in the best interests' assessment.[118]

In immigration cases, the court often equates young age with 'adaptability', which has frequently been a decisive argument for expulsion. An adaptable child is considered able to adjust to a new environment, even with non-existent ties to that country.[119] Adaptability does not have a definition or benchmark age, but the court seems to consider that the younger the child, the more adaptable.[120] It is unclear whether adaptability is calculated from the initiation

112 *Kissiwa Koffi*, above n 58, [67]–[69]. Blaming mothers has been criticised, see Smyth, above n 21, 83–84; F Staiano, 'Good Mothers, Bad Mothers: Transnational Mothering in the European Court of Human Rights' Case Law' [2013] EJML 155.
113 *Antwi*, above n 78, [93]–[98].
114 It has been suggested that the court treats native or white women more favourably than migrant women, see B de Hart, 'Love Thy Neighbour: Family Reunification and the Rights of Insiders' (2009) 11 EJML 235, 249.
115 *Strand Lobben*, above n 91, [75]; Committee on the Rights of the Child, *General Comment No 7* (2005) on implementing child rights in early childhood (UN Doc CRC/C/GC/7/Rev.1), [13].
116 *Pontes v Portugal* (Application No 19554/09) 10 April 2012, [80].
117 *RMS*, above n 93, [79].
118 *Ageyev*, above n 42, [143]; *Glesmann v Germany* (Application No 25706/03) 10 January 2008, [106].
119 Adaptability resembles the principle in child protection cases that after a considerable period of time in public care, protection of the new family life may take priority. In child protection cases, however, the focus is on which alternative would best serve the child's interests; adaptability assessments focus on whether the child is *able* to change environment.
120 Older children can be considered adaptable too; girls aged 12, 10, and 7 at the time of the final domestic decision about the expulsion of their father were considered adaptable in *Palanci v Switzerland* (Application No 2607/08) 25 March 2014, [61]; *Jeunesse*, above n 26, [117], was decided in favour of the applicant because of best interests, but the court first

of national proceedings, final national decision, actual expulsion, or the ECtHR judgment. This can lead to discriminatory outcomes, especially concerning older children who may reach the age of majority during the proceedings.[121]

Adaptability often trumps cultural and linguistic ties and, sometimes, nationality. Carmen Draghici shows that some cases imply that the citizen of a contracting state to the European Convention has no presumptive right to enjoy family life with a child who does not possess the same nationality.[122] Children aged six and one-and-a-half when the exclusion order was finalised were considered adaptable even though they were Dutch nationals and had always lived in the country.[123] A six-year-old Swiss national was considered able to adapt to the Ivory Coast, to where her mother was expelled.[124] Expulsion of a father of children aged eight and five,[125] as well as a father of children attending primary school and kindergarten,[126] was considered acceptable because of the children's presumed adaptability. Expulsion of a nine-year-old's father eventually breached Article 8 because of other factors, but the girl was initially found adaptable.[127] Adaptability has often outweighed the potential difficulties of moving to another country.[128] In *SJ*, the court noted on a general level that '[w]here there are children, the crucial question is whether they are of an age at which they can adjust to a different environment'. In that case, the ECtHR held that a mother of children aged six, four, and one could be expelled because the children's ages made their adaptability 'still sufficiently great' to make the resettlement realistic. The applicant, who had HIV, argued that the care she needed was not available in Nigeria. No violation was found even though the children were born in Belgium and had strong ties there. Surprisingly, the court's reasoning was partly based on family unity, as it found decisive that the expulsion would not separate the applicant and her children.[129]

Regarding immigration cases where parents have separated, Smyth has noted that the child's young age aids the parent's claim since the court considers it important for young children to maintain regular contact with both parents.[130] Conversely, a 15-year-old has been regarded 'not as much in need of care as young children'.[131] This line of reasoning contrasts with cases where parents are together. In *Berisha*, the parents had the right to reside in Switzerland and the issue was whether their children, who had resided there irregularly, should be allowed to join them. The court acknowledged the paramount status of best interests and broadly referred to the CRC but found no violation. The court held that the applicants were not prevented from travelling to Kosovo to ensure that the youngest child, a ten-year-old, was provided with adequate care and education, so her best interests were safeguarded.[132] The dissenters noted that such a young child was heavily dependent on her parents, and her return to Kosovo would

accepted that the children were of 'relatively young age' – the oldest was 14 when the ECtHR gave its judgment. In contrast, girls aged 12 and 14 were not adaptable (*Kamenov*, above n 56, [40]). See also Kilkelly, above n 20, 109–110.

121 Smyth, above n 21, 75; Spijkerboer, above n 18, 289.

122 Draghici, above n 4, 347.

123 *Üner*, above n 51, [64]; see also *Onur v United Kingdom*, above n 59, [60].

124 *Kissiwa Koffi*, above n 58, [68].

125 *Bajsultanov v Austria* (Application No 54131/10) 12 June 2012, [90]; non-violation despite the fact that the children had an independent asylum status in Austria.

126 *Salija*, above n 60, [50].

127 *Kaplan*, above n 83, [87].

128 *Adeishvili (Mazmishvili) v Russia* (Application No 43553/10) 16 October 2014, [83].

129 *SJ v Belgium* (Application No 70055/10) (2015) 61 EHRR 585, [142]–[147]; cf dissenting opinion of Judge Power-Forde. The case was eventually struck out and solved by a friendly settlement by which the applicant and her children were granted leave to remain.

130 Smyth, above n 21, 77–78; see, eg, *Da Silva*, above n 24, and *Nunez*, above n 111.

131 *El Ghatet*, above n 79, [51].

132 *Berisha*, above n 28, [60].

cause significant uprooting and difficulties.[133] In *Berisha* and other cases in which the children or parents have initially entered the country unlawfully, the court's approach may be explained partly by an unwillingness to condemn national authorities for deterring illegal conduct. From a children's rights' perspective, however, children should not be blamed for their parents' actions. Adaptability is relied on in expulsion cases, too, as shown earlier.

Assessing adaptability based on a child's age does not accommodate the child's individual situation. The assessment of adaptability in immigration cases should as a minimum be combined with an assessment of the special care needs of young children and of relevant rights, such as the right to education, because the children concerned often attend school in the host country.[134] In *Zakayev and Safanova*, the children's vulnerability was recognised. A factor in the applicant couple's favour was that they and their children had already twice been subjected to the stress of forced migration. This was demonstrated by the children's fragile health and their integration in their current environment. The court accepted that moving to an unfamiliar place would be contrary to the children's interests and lead to a deterioration of their well-being.[135] Interestingly, the court has been more understanding of difficulties faced by migrants in child protection cases than in immigration cases that do not involve child protection. In *EP*, the court held that adoption following the taking into care of the child was 'so severe a measure against a mother who had just arrived in Italy with her little daughter who spoke only Greek, and about whose past the authorities dealing with the case knew very little'.[136] In *KAB*, the court criticised the failure to recognise that a Nigerian national whose expulsion was ordered had a one-year-old child who had subsequently been taken into care and declared available for adoption. The court considered the situation especially serious because of the child's age.[137]

Obtaining children's views and giving them due weight

Another difference between child protection and immigration cases is the importance of children's views. Following Article 12 CRC, a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting him or her, the views being given due weight in accordance with his or her age and maturity. In some child protection cases, the child's opinion (or lack of availability) has been decisive, which is promising for the alignment of the European Convention and the CRC. The Committee on the Rights of the Child has underlined the interdependent nature of best interests and participation; an outcome cannot be in the child's best interests if the child has not had an opportunity to express her views.[138] The children concerned are sometimes too young to be heard, but acknowledging the importance of their views is nonetheless essential.[139]

The ECtHR has, for example, stressed the fact that a child, aged 14 when the ECtHR gave its judgment, had 'always firmly indicated' her wish not to leave her foster home.[140] In *Aune*, the court mentioned the child's wishes, as heard by national courts, as an important factor.[141] In *Gnahoré*, the fact that authorities had sought the child's views was a factor in proving that neither renewing the care order nor contact restrictions breached Article 8.[142] In *L*, the denial

133 *Berisha*, above n 28, dissenting opinion of Judges Jočienė and Karakaş.
134 *Üner*, above n 51, dissenting opinion of Judge Baka; Leloup, above n 21, 403.
135 *Zakayev and Safanova*, above n 101, [46].
136 *EP*, above n 37, [63]–[65].
137 *KAB v Spain* (Application No 59819/08) 10 April 2012, [108].
138 CRC/C/GC/14, [43]–[45].
139 See also Kilkelly, above n 20, 279–280.
140 *Bronda*, above n 27, [62].
141 *Aune v Norway* (Application No 52502/07) (2012) 54 EHRR 32, [72].
142 *Gnahoré*, above n 14, [57]–[63].

of a grandfather's contact was acceptable partly because the two children had indicated their wish not to meet the grandfather, who was suspected of sexual abuse.[143] In *Nanning*, the court found a non-violation regarding a continued placement in a foster family largely based on an expert assessment that the child's 'firm wish to remain with the foster family' should be respected. The court observed that the child had not been heard in person but still considered the assessment valid.[144] In assessing contact restrictions, the court has acknowledged the views of children who did not want to meet the applicant mother more than twice a year, as well as the fact that the children reacted negatively to the meetings.[145]

The effect of external circumstances on the child's opinion has been recognised in some cases. In assessing contact restrictions in *Glesmann*, the court found a non-violation largely because the child, then aged 12, had consistently declared her wish not to have contact with the applicant and only gave up her resistance to end the court proceedings.[146] The minority in *Gnahoré* held that even if the boy's opinion was an important factor, it was not sufficient justification for the prohibition of contact because the opinion was understandably affected by the fact that he was physically distant from his original family.[147]

In child protection cases, the court has also criticised national authorities for not hearing the children. In *Saviny*, where the children had been removed from the home because of inadequate living conditions and shortcomings in care, the court noted that at no stage had the children been heard, although the eldest was 13.[148] In *NTS*, three brothers had been returned to their biological father, who had drug problems, after being placed with their aunt for years. The court found that the 'two fundamental aspects' of the case were whether the children had been duly involved in the proceedings and whether the decisions were 'dictated' by their best interests. Domestic courts had not heard the children, considered the possibility of hearing at least the eldest boy, or given reasons for not hearing him. The children's judicial representation had, therefore, been insufficient. The court extensively quoted the General Comments on best interests and on the right to be heard, implying the relationship between them. Domestic courts had 'failed to give adequate consideration to one important fact: the boys did not want to be reunited with their father'. An expert opinion, which indicated that forced return would be contrary to the boys' best interests, seems to have been relevant in the assessment. Best interests consideration had been 'inadequate and one-sided', and the boys' 'emotional state of mind was simply ignored'.[149]

In immigration cases, the court has rarely paid attention to the children's views. Even in cases where the court conducts a separate best interests assessment, the child's opinion usually is not considered regardless of whether the applicant has argued that the child(ren) involved should be heard or whether the child is also an applicant. In *Palanci*, the applicant father, who faced deportation, alleged that the authorities had never conducted a hearing with his family and consequently had not sufficiently taken his children's best interests into account. This aspect was not addressed by the court.[150] In *Kissiwa Koffi*, the son's status as the second applicant was

143 *L*, above n 45, [127]–[128].
144 *Nanning v Germany* (Application No 39741/02) 12 July 2007, [70]–[71].
145 *Levin*, above n 90, [67].
146 *Glesmann*, above n 118, [110].
147 *Gnahoré*, above n 14, [57]–[63]; joint partly dissenting opinion of Judges Tulkens and Loucaides.
148 *Saviny v Ukraine* (Application No 39948/06) (2010) 51 EHRR 33, [59].
149 *NTS and Others v Georgia* (Application No 71776/12) [2017] 1 FLR 898, [40]–[42] and [73]–[84]; Committee on the Rights of the Child, *General Comment No 12* (2009) on the right of the child to be heard (UN Doc CRC/C/GC/12); CRC/C/GC/14.
150 *Palanci*, above n 120.

mostly ignored, which is reflected in the language: 'as to the common child . . . the court cannot speculate on the decision of the parents concerning his fate'.[151]

On the other hand, in *Osman*, it was decisive that the national authorities had ignored the opinion of the applicant, a minor at the time of the events, whose residence permit had not been reinstated. The court noted that the applicant's view – that her father's decision to send her to Kenya for a long time had been against her will and not in her best interests – had been disregarded by the authorities. The court held that even though the care and upbringing of children normally require parents to decide where the child resides, authorities cannot ignore the child's interest, including Article 8 rights.[152]

As Smyth has noted, the ECtHR cannot shoulder all the blame for the rare appearances of children's views in immigration cases since frequently the children involved are not party to the proceedings at the national level.[153] The scarce attention to children's views in immigration cases may be partly explained by the differences in national procedures in child protection cases as opposed to immigration cases. In the former, child welfare authorities often conduct a hearing with the child. On the other hand, children are applicants more often in immigration cases before the ECtHR. Moreover, the uneven role assigned to the child's views may partly relate to the aspects on which those views are gauged. One might easily argue that the child should not be reunited with a potentially harmful parent if the child opposes it, but claiming that domestic authorities should regularly respect the child's choice of country of residence is more difficult. Here, again, the different role of best interests in child protection and immigration cases is obvious.

However, it is important to underline that hearing children is a procedural guarantee. According to Article 12 CRC, children have the right to express their views in all matters affecting them, regardless of the outcome. Child protection cases clearly affect children but so do decisions about family reunification and the child or parent's expulsion. The ECtHR itself has affirmed that in light of Article 12 CRC, 'it cannot be said that the children capable of forming their own views were sufficiently involved in the decision-making process if they were not provided with the opportunity to be heard and thus express their views'.[154] In assessing an issue with long-lasting consequences, the children concerned should have the opportunity to express their views, irrespective of the context.

Conclusions

Several patterns emerge in the different ways that the ECtHR treats the best interests of the child in child protection and immigration cases. In child protection cases, the best interests of the child are the focus of the assessment and are often decisive. Some differences are explained by the different nature of the two case groups and some differences are common sense, such as the emphasis on physical integrity in child protection cases and on ties with the country of origin or respondent state in immigration cases; but some differences appear unjustified in light of Article 3 CRC.

The most notable difference relates to a child's right not to be separated from her parents. In child protection cases, the court assumes that it is in the child's best interests to live with her parents. Taking a child into care can only be justified if required because of best interests. If the

151 *Kissiwa Koffi*, above n 58, [68], author's translation (original French passage: 'quant à l'enfant commun . . . la Cour ne saurait spéculer sur la décision des parents concernant le sort de cet enfant'); cf dissenting opinion of Judges Raimondi and Pinto de Albuquerque.
152 *Osman*, above n 106, [73].
153 Smyth, above n 21, 91.
154 *M and M*, above n 41, [180]–[181].

child has been taken into care, contact with her parents is considered to be in her best interests, in conformity with Article 9 CRC. In immigration cases, however, the court does not assume that best interests require living with both parents, but assesses this as a separate question. Furthermore, the burden of proof operates differently in child protection and immigration cases. In child protection cases, the state has to prove that the limitations to the right to family life are necessary. In immigration cases, the applicant – especially the applicant father – often has to demonstrate a significant role in the family or close relationship with the child.[155] Refugees, however, receive more favourable treatment.

A second difference is the significance of the child's age. In child protection cases, the ECtHR has considered the care needs of young children. In immigration cases, young age demonstrates 'adaptability'; 'adaptable' children are considered able to integrate into another country, often even if they are nationals of the respondent state. A third difference is that children's views have been important in several child protection cases but rarely in immigration cases.

Considering these disparities, the court should take family unity as its starting point in immigration cases, as it does in child protection cases. This does not mean that close ties should not serve as an argument against deportation or for family reunification, or that exclusion would never be permissible.[156] Rather, family unity should be the default position in all case groups, and the court should require the state to justify the deportation or refusal of entry.[157]

The following improvements can be enacted to make argumentation in immigration cases more child-friendly. All aspects listed in Article 9 CRC, including separation, the procedural limb, and maintaining contact, are separately assessed by the ECtHR in child protection cases but not in immigration cases. Applying the structure of Article 9 CRC to immigration cases as well, would better serve children regardless of nationality and immigration status.[158] Underlining the procedural side of Article 8, identified in child protection cases, would be particularly beneficial. Some indications of the procedural side in other case groups can be found; in *M and M*, for example, the court stated that the procedural requirements identified in a number of child-care cases 'apply *mutatis mutandis* in any judicial or administrative proceedings affecting children's rights under Article 8 of the present Convention'.[159]

Another way to align argumentation is to refer deliberately in immigration cases to judgments from other case groups. The ECtHR often refers to other cases when discussing the weight of best interests on a general level in immigration cases, but references are rarer when the facts of the case are examined. In addition, the court could more actively oversee that national authorities do not conflate the assessment and weight of best interests; separating the two is possible even when no violation is found.[160] Applying a more nuanced adaptability assessment is also recommended to better account for each child's individual situation; there are some promising examples where the court has been sensitive to circumstances contributing to children's vulnerability. Furthermore, a more applicant-friendly burden of proof could be applied in immigration cases, and *Üner* criteria and other checklists should be applied

155 See also Draghici, above n 4, 344–347; Leloup, above n 107, 59–60.

156 See, eg, *Husseini v Sweden* (Application No 10611/09) 13 October 2011.

157 Smyth, above n 21, 88; Spijkerboer, above n 18, 292.

158 Similarly, see U Kilkelly, 'The CRC Litigation under the ECHR. The CRC and the ECHR: The Contribution of the European Court of Human Rights to the Implementation of Article 12 of the CRC', in T Liefaard and JE Doek (eds), *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015). Article 9 CRC has been referred to in: *NP v Moldova* (Application No 58455/13) 6 October 2015, [42]; *Kocherov and Sergeyeva*, above n 38, [58]; *Ageyevy*, above n 42, [110]; *AK and L v Croatia* (Application No 37956/11) 8 January 2013, [34]; *X v Croatia* (Application No 11223/04) (2008) 51 EHRR 511, [23] (child protection); *Jeunesse*, above n 26, [73], and *Berisha*, above n 28, [33] (immigration).

159 *M and M*, above n 41, [181].

160 See, eg, *Sarközi and Mahran*, above n 85, [72].

transparently.[161] Finally, in accordance with Article 12 CRC, the court could oversee whether national authorities have respected the child's right to be heard.

Reconceptualising public interest in immigration cases is also essential. In immigration cases, public interest is equated with the state's interest in immigration control and presented as a counter-argument to the rights of individuals.[162] This juxtaposition is not self-evident; it could be argued that preserving family life is the state's interest, too.[163] In the context of adoption and the child's right to know her origins, the court has declared the child's best interests primary to public interest.[164] At a minimum, the state should be required to examine public interest further and not take it for granted.[165] As Judge Turković has summarised:

> 'it is of utmost importance to balance wisely society's impulse to attach greater weight to the public interest than to private and family life claims under Article 8 of the Convention. After all, it is impossible to make a sharp distinction between the two. It is in the public interest to protect the private- and family-life claims of long-term migrants.'[166]

This article has identified problems in the court's use of the best interests concept, especially in immigration cases. An approach focusing on the limitations of legitimate expectations for adults, such as whether the immigration status was precarious when the family was formed, risks overlooking the interests of children.[167] From the perspective of children's rights, it is problematic that parents' choices and immigration status often determine the extent to which their children can effectively exercise their human rights. The European Convention system has the potential to protect children's rights in the immigration context, too, but so far that potential has not been fully realised.

161 *Üner*, above n 51, joint dissenting opinion of Judges Costa, Zupančič and Türmen.
162 See, eg, *Da Silva*, n 24 above, [44].
163 H Stalford and K Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in H Stalford, K Hollingsworth and S Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart, 2017).
164 *Todorova*, above n 76, [77].
165 See, eg, *Alim v Russia* (Application No 39417/07) 27 September 2011, [96].
166 *Ndidi v United Kingdom* (Application No 41215/14) (2017) *The Times* 9 October, dissenting opinion of Judge Turković.
167 Draghici, above n 4, 357.

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OXFORD

Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights

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ABSTRACT

According to Article 3(1) of the United Nations Convention on the Rights of the Child, the best interests of the child have to be a primary consideration in all cases concerning children. The Committee on the Rights of the Child understands Article 3(1) as a 'threefold concept': a substantive right, an interpretive principle and a rule of procedure. This article argues that the provision is best understood as a procedural obligation. Understanding Article 3(1) as a procedural obligation remedies key problems that originate from interpreting the provision as a substantive right. A significant strength of the procedural approach is that it can be consistently applied in different case groups. This article illustrates the argument with the case law of the European Court of Human Rights related to children, in which the article detects three layers of a procedural approach to the best interests of the child.

KEYWORDS: children's rights, best interests of the child, procedural review, European Convention on Human Rights, Convention on the Rights of the Child

III

1. INTRODUCTION

A 'procedural turn' has taken place in the protection of human rights, as many scholars have recently shown. The procedural turn means that decision-making bodies turn increasingly to procedural arguments instead of or in addition to substantive arguments when justifying their decisions. Signs of a procedural turn can be detected in the decision-making of supranational bodies such as the European Court of Human Rights (ECtHR or 'the Court') and the Court of Justice of the European Union, as well as in decision-making in national administrative and legislative processes and procedures before national courts.[1]

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1 For example, Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017); Popelier and Van De Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?' (2017) 30

This article discusses the procedural turn in the context of Article 3(1) of the United Nations Convention on the Rights of the Child (CRC),[2] according to which in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The United Nations Committee on the Rights of the Child ('the Committee' or 'the CRC Committee') has expressed that Article 3(1) is a 'threefold concept': a substantive right, an interpretive principle and a rule of procedure.[3] The substantive dimension has traditionally been prominent in case law.[4] Even though courts often pay attention to procedural elements too, best interests are generally used as a standard to measure the outcome of a decision.[5] When talking about weighing interests and comparing outcomes regarding which option respects the best interests of the child, a substantive understanding is implicit.[6] While the importance of identifying elements relevant in a best interests assessment needs to be acknowledged, challenges arise too. The concept's vagueness provides a significant problem in understanding best interests as a substantive right: what do 'best interests' mean and how can they be defined in individual situations?[7] This vagueness originates not only from understanding best interests as a substantive right but also from the indeterminacy of the concept itself and its application to a broad range of situations. However, a substantive understanding is an important source of vagueness. Another problem concerns balancing rights: to what extent should decision-makers prioritise the interests of the child over the interests of the parents, other children or the State? Although some suggestions have been made to guide balancing,[8] no clear criteria exist for striking a rights-compliant balance. This situation risks leading to inconsistent case law.

This article argues that the potential of the best interests concept lies in relying on Article 3(1) as a procedural obligation. By 'potential', I mean that the interpretation

Leiden Journal of International Law 5; Nussberger, 'Procedural Review by the ECHR: View from the Court' in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017) 161 at 164-5; Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019) 68 *International & Comparative Law Quarterly* 91; Spano, 'The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 *Human Rights Law Review* 473.

2 1989, 1577 UNTS 3.

3 Committee on the Rights of the Child, General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013 at para 6.

4 For descriptions of a substantive approach in national case law and legislation, see, for example, Langrognet, 'The Best Interests of the Child in French Deportation Case Law' (2018) 18 *Human Rights Law Review* 567; Willmott et al., 'When is it in a Child's Best Interests to Withhold or Withdraw Life-Sustaining Treatment? An Evolving Australian Jurisprudence' (2018) 25 *Journal of Law and Medicine* 944.

5 For ECtHR case law, see infra n 13.

6 See, for example, Sandberg, 'The Role of National Courts in Promoting Children's Rights' (2014) 22 *International Journal of Children's Rights* 1 at 9; Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23 *International Journal of Children's Rights* 3 at 5. Weighing of interests is the approach suggested by the Committee, see Committee on the Rights of the Child, supra n 3 at paras 80-81.

7 Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226 at 229.

8 For example, Eekelaar and Tobin, 'The Best Interests of the Child' in Tobin (ed.), *The UN Convention on the Rights of the Child. A Commentary* (2019) 73 at 95-100.

helps remedy some key problems that originate from interpreting the provision as a substantive right, such as vagueness and the difficulty of applying the concept with predictable results. A close reading of the CRC and related documents supports such an interpretation. When understood as a predominantly procedural obligation, Article 3(1) aligns closely with the object and purpose of the CRC, which is to safeguard the human rights of children. In addition, a significant strength of the procedural approach is that it can be consistently applied in different case groups. To illustrate how a procedural approach to the best interests of the child may look in practice, this article suggests a three-layered categorisation of Court case law where the Court has taken a procedural approach to the best interests of the child.[9] This categorisation builds on a categorisation created by Brems.[10] In the first category, the ECtHR acknowledges that in cases concerning children a best interests consideration is necessary in order to satisfy the requirements of the substantive Article of the European Convention on Human Rights (ECHR)[11] in question. In the second category, the ECtHR pays attention to the quality of the best interests consideration. In the third category, which is the most specific, the ECtHR reviews whether national authorities have considered certain factors with sufficient attention.

The ECtHR is used as an example in this article because it has arguably taken a procedural turn in the protection of human rights in general and, more specifically, in assessing the best interests of children.[12] The ECtHR plays a central role in interpreting human rights obligations in concrete cases, and recent developments in ECtHR jurisprudence demonstrate both the challenges of a substantive approach to best interests and the potential solutions offered by a procedural approach. The Court regularly refers to the best interests of the child in different contexts, both as a substantive right and a procedural obligation, and a vast body of case law allows for a reliable analysis of how the Court understands the best interests concept. However, despite the Court's frequent references to best interests, its use of the concept does not often lead to child-friendly outcomes. It has been demonstrated that a substantive approach to best interests frequently results in problematic differences between case groups and ECHR Articles. Consequently, rights become very dependent on the context and individual circumstances in which they are claimed.[13] Previous research indicates that a procedural

9 Cases reviewed consist of jurisprudence where the Court has referred to the best interests of the child and used a procedural approach. The focus is on recent cases (years 2018 and 2019) but older cases are occasionally discussed as well, when relevant. Case law has been followed until 31 December 2019.

10 See below at Section 2.

11 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 005.

12 Brems, 'The "Logics" of Procedural-Type Review by the European Court of Human Rights' in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017) 17 at 17; Kilkelly, 'Protecting children's rights under the ECHR: The role of positive obligations' (2010) 61 *Northern Ireland Legal Quarterly* 245.

13 See, for example, Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?' (2015) 17 *European Journal of Migration and Law* 70; Bracken, 'Assessing the best interests of the child in cases of cross-border surrogacy: inconsistency in the Strasbourg approach?' (2017) 39 *Journal of Social Welfare and Family Law* 368; Fenton-Glynn, 'International surrogacy before the European Court of Human Rights' (2017) 13 *Journal of Private International Law* 546; Sormunen, 'A comparison of child protection and immigration jurisprudence of the European Court of Human Rights: what role for the best interests of the child?' (2019) 31 *Child and Family Law Quarterly* 248.

approach may provide a solution to these problems. Kilkelly has identified the development of procedural rights and the focus on positive obligations as the main techniques through which the ECtHR advances children's rights.[14] A procedural approach to the best interests of the child has arguably proven effective in safeguarding fundamental and human rights and more applicant-friendly than a substantive approach, especially in cases with a wide margin of appreciation.[15]

It is important to stress that this article does not claim that the procedural approach has replaced the substantive approach entirely in ECtHR cases concerning best interests. This is clearly not the case. In several recent judgments, the Court's reasoning builds on substantive arguments only.[16] At times, the ECtHR has flirted with the procedural approach and then refrained from using it.[17] The Court has even expressly refused the procedural approach.[18] It seems that several, partly contrasting developments, including the procedural turn, are taking place at once. The ECtHR does not apply the same logic in every case. Despite this, the Court relies on the procedural approach increasingly often.

This article first introduces procedural review of human rights in general and then in the context of the ECtHR. After that, it analyses the nature of the best interests provision. Based on both an interpretation of Article 3(1) as a provision in an international treaty and an analysis of the views of the CRC Committee, the article suggests that the provision should be understood predominantly as a procedural obligation. The article then discusses what a procedural approach to the best interests of the child currently looks like in the case law of the ECtHR.

2. PROCEDURAL REVIEW OF FUNDAMENTAL AND HUMAN RIGHTS

The term 'procedural approach' (also 'procedural review' or 'process-based review') refers to different approaches for including procedural elements in a human rights review. The different types of procedural review share a focus on how the decision was reached. The procedural approach can be 'pure' in that it only reviews the procedure and remains silent about substantive concerns. Alternatively, the procedural approach can be 'semi procedural', combining elements of procedural and substantive review,[19] which shows that emphasising procedural review does not necessarily mean abandoning substantive review; rather, the two are complementary. Proceduralisation can also be understood more widely as reflecting the structural relationship of different

14 Kilkelly, 'The CRC in Litigation under the ECHR' in Liefaard and Doek (eds), *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 193 at 195-6.

15 Leloup, 'Some Reflections on the Principle of the Best Interests of the Child in European Expulsion Case Law' in Benedek et al. (eds), (2018) 10 *European Yearbook on Human Rights* 395 at 415. See also Brems and Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 *Human Rights Quarterly* 176 at 197–200.

16 See, for example, *SS v Slovenia* Application No 40938/16, Merits and Just Satisfaction, 30 October 2018; *Pojatina v Croatia* Application No 18568/12, Merits and Just Satisfaction, 4 October 2018.

17 For example, *Ejimson v Germany* Application No 58681/12, Merits and Just Satisfaction, 1 March 2018 at paras 49, 60-65.

18 *Assem Hassan Ali v Denmark* Application No 25593/14, Merits and Just Satisfaction, 23 October 2018 at paras 60-61.

19 Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271.

decision-making bodies in the European system for the protection of human rights.[20] Additionally, the label 'procedural' may be understood to describe either the nature of the right or a court's conceptualisation of the right. A human right may itself be a procedural right, such as the right to a fair trial. Some rights, typically worded in general terms, are understood by courts as procedural obligations in certain circumstances.[21]

Procedural review has benefits regarding legitimacy and subsidiarity. Studies on procedural justice have shown that the acceptance of decisions depends to a great extent on the procedures used to reach those decisions.[22] Procedural justice is especially important for the legitimacy of a body deciding controversial or divisive issues, such as disputes over human rights.[23] Procedural review is often linked to subsidiarity, especially in the case of supranational bodies.[24]

A drawback of the procedural approach is that its outcome can be difficult to predict, which is why it can lack the certainty of other methods.[25] Another concern is the review's breadth: if procedural review is too narrow, relying on it may produce unpredictable conclusions. The review's quality is thus essential. The neutrality of procedural review can also be questioned. Huijbers has argued in the context of the ECtHR that procedural review is not necessarily more neutral than substantive review. There are different types of procedural standards, not all of which are neutral in that they would not limit the political choices of States. The more detailed and concrete the procedural standards, the more the ECtHR imposes its standards on States. In addition, procedural obligations may shape future substantive conclusions.[26]

When assessing procedural review's legitimacy, it is important to consider whether the review consists of drawing positive or negative inferences from the quality of the process. Brems has argued that while drawing a negative inference—finding a violation based on the discovery that procedural obligations were not followed—is acceptable, drawing a positive inference—arriving at a non-violation based on a mere discovery that procedural obligations were followed—is more problematic.[27] In the context of the ECtHR, Gerards has found that negative inferences are drawn more directly and cases with a positive type of procedural review usually include more substantive arguments in addition to procedural arguments. The lack of procedural care is often used as an important or decisive reason for finding a violation, whereas demonstrated procedural care is usually one argument considered alongside more substantive considerations. Thus,

20 Arnardóttir, 'Organised Retreat? The Move from "Substantive" to "Procedural" Review in the ECtHR's Case Law on the Margin of Appreciation' (2015) 5 *European Society of International Law Conference Paper Series* 1.

21 Sathanapally, 'The Modest Promise of "Procedural Review" in Fundamental Rights Cases' in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017) 40 at 45.

22 Tyler, 'Procedural Justice and the Courts' (2007) 44 *Court Review* 26.

23 Brems and Lavrysen, supra n 15.

24 Brems, supra n 12 at 22-6; Beijer, 'Procedural Fundamental Rights Review by the Court of Justice of the European Union' in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017) 177 at 179-80.

25 Kilkelly, supra n 14 at 195-6.

26 Huijbers, 'Procedural-Type Review: A More Neutral Approach to Human Rights Protection by the European Court of Human Rights?' (2017) 9 *European Society of International Law Conference Paper Series*.

27 Brems, supra n 12 at 39.

procedural review by the ECtHR is rarely purely positive.[28] It has been argued that while procedural (or semi-procedural) review can contribute to the ECtHR's legitimacy as a subsidiary body that complements national systems, this is not necessarily true when the Court draws a negative inference from the quality of the procedure by concluding that the national procedure did not fulfil the ECHR requirements.[29]

In previous research, different categorisations of procedural review have been proposed according to the scope of the review, type of obligation (positive or negative) and the stage where procedural arguments appear in the reasoning. In the context of the ECtHR, Popelier and Van De Heyning have distinguished between 'procedural rationality review', in which the decision-making procedure's quality is a decisive factor in assessing whether an interference in human rights was proportional, and 'pure procedural review', in which formal compliance with procedural requirements is the only focus.[30] Gerards has suggested a broad distinction between two types of procedural review. In the first type, the Court sets positive obligations of a procedural nature under an ECHR right. In the second, the Court relies on the quality of national decision-making when reviewing whether States have acted in conformity with ECHR provisions.[31] Brems and Lavrysen have identified two procedural approaches of the ECtHR: context-specific assessment focused on the case at hand and a more comprehensive approach in which general obligations related to procedural fairness are read into substantive human rights provisions.[32] Based on Gerards' and Brems and Lavrysen's categorisations, Arnardóttir has determined that the procedural turn in the ECtHR takes two forms. In the first form, the 'procedural rights approach', explicit procedural requirements are interpreted into different ECHR provisions and 'become part of the protective scope of the right in question alongside issues relating to the substance of the relevant right'. In the second form, the 'procedural review in the strict sense', procedural elements are included in 'the balance of reasons when the Court pronounces on the substantive merits and assesses the proportionality or reasonableness of a measure'.[33]

Brems has argued that based on process efficacy and subsidiarity considerations, the optimal type of procedural review assesses the quality of the domestic human rights scrutiny. This type of review is not strictly procedural but rather is 'mixed' or 'substance-flavoured', concentrating primarily on the procedure but also incorporating some substantive elements.[34] Brems has identified three types of substance-flavoured procedural review in the ECtHR, ranging from a broad-brush approach to the imposition of more specific requirements. For the purposes of this article, Brems' categorisation is particularly interesting. The first type is a broad approach in which the Court considers whether national authorities have conducted a proportionality analysis or weighing of interests but does not provide further guidance as to more specific requirements.

28 Gerards, 'Procedural Review by the ECtHR: A Typology' in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017) 127 at 150-5.

29 Popelier and Van De Heyning, supra n 1 at 20; Nussberger, supra n 1 at 163.

30 Popelier and Van De Heyning, ibid. at 9-10.

31 Gerards, supra n 8 at 129.

32 Brems and Lavrysen, supra n 5 at 196.

33 Arnardóttir, 'The "procedural turn" under the European Convention on Human Rights and presumptions of Convention compliance' (2017) 15 *International Journal of Constitutional Law* 9 at 13-14.

34 Brems, supra n 12 at 34-5.

The second is a broad approach with a specific substantive focus as authorities must show that they have explicitly taken into account certain relevant elements, for example, the special vulnerability of affected persons. The third is the most specific approach where the ECtHR reviews the human rights scrutiny of domestic courts by drawing concrete checklists of criteria to guide proportionality analysis, such as the *Üner* criteria concerning the expulsion of foreigners.[35]

Before showing how Brems' three approaches can be used to classify ECtHR case law concerning the best interests of the child, it is necessary to discuss the nature of the best interests provision. The next section analyses Article 3(1) of the CRC and suggests that the best interests concept should be understood predominantly as a procedural obligation.

3. BEST INTERESTS OF THE CHILD AS A PROCEDURAL OBLIGATION

A. A Threefold Concept?

The obligation to take the best interests of the child into account in actions concerning children, enshrined in Article 3(1) of the CRC, has an important status in the context of children's rights.[36] The CRC Committee elevated Article 3 as one of the 'general principles' of the CRC when drafting the guidelines for State reports in 1991.[37] The general principles have particular importance for interpreting the whole convention.[38] Yet Article 3(1) has also raised criticism. It is different from other CRC provisions in its unusual formulation of not containing the word 'right'.[39] The provision does not define best interests, nor does it outline any particular duties or precise rules.[40] It is, therefore, unclear what 'best interests' are and how they differ from rights. Furthermore, the meaning of taking best interests as a primary consideration is uncertain. These questions are only some of those that contribute to the confusion around how Article 3(1) of the CRC should be interpreted. It is debatable whether the provision expresses an obligation different from or complementary to the rights protected by other provisions in the CRC; that is, does relying on the rights of the child produce the same—or a better—outcome than a best interests assessment?[41]

When interpreting Article 3(1) of the CRC, it is useful to examine the CRC Committee's views. Pursuant to Article 43 of the CRC, the Committee is established '[f]or the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention'. The Committee has

35 Ibid. at 35-7.

36 See, for example, Freeman, 'Article 3. The Best Interests of the Child' in André et al. (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (2007) 1 at 1.

37 CRC/C/1991/SR.1 at para 58.

38 Other general principles are Articles 2, 6 and 12.

39 Kilkelly, 'The "Best Interests" of the Child: A Gateway to Children's Rights?' in Sutherland and Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child. Best Interests, Welfare and Well-being* (2016) 51 at 57.

40 Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 *International Journal of Children's Rights* 483 at 485.

41 Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Liefaard and Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child* (2017) 61 at 65-6; Kilkelly, supra n 39 at 60-61.

taken an active role in interpreting CRC Articles and other relevant themes.[42] In 2013, the Committee issued a General Comment clarifying the interpretation of Article 3(1). The General Comment explains the best interests of the child as 'a threefold concept' comprising (1) a substantive right, (2) a fundamental, interpretative legal principle and (3) a rule of procedure.[43] The following analysis focuses on whether conceptualising the provision as a threefold concept is helpful.

The different dimensions of Article 3(1) are characterised in the General Comment. The function as a substantive right refers to the 'right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake'. The substantive right dimension also refers to 'the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general'. Furthermore, Article 3(1) is characterised as directly applicable. The second function identified by the Committee is that the provision is a 'fundamental, interpretative legal principle', which means that if a provision can be interpreted in several ways, 'the interpretation which most effectively serves the child's best interests should be chosen'. The CRC rights set the framework for interpretation. The third function of the concept is a 'rule of procedure', which refers to the obligation to include an evaluation in decision-making processes of the decision's possible impact on a specific child, an identified group of children or children in general. The function as a rule of procedure also refers to the procedural guarantees required to assess and determine the best interests of the child, as well as to the obligation to explain how best interests have been defined in a specific case, what criteria the assessment is based on and how the child's interests have been weighed against other considerations. According to the Committee, a decision's justification must show that the right protected by Article 3(1) of the CRC has been explicitly taken into account.[44]

The Committee's identification of best interests as a substantive right suggests that best interests can be equated with children's rights. In addition to expressly characterising best interests as a substantive right, the Committee stresses that '[t]he concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all rights recognised in the Convention and the holistic development of the child'.[45] A rights-based understanding—assessing and determining best interests in light of the whole CRC—is logical. The Committee also expresses an outcome-focused understanding of best interests; a significant part of the General Comment consists of describing which 'elements' are important in assessing the best interests of the child.[46] The General Comment also addresses the balancing of best interests, implying that best interests can be weighed against other rights and interests in a similar way to human rights.[47]

42 See also Gras, *Monitoring the Convention on the Rights of the Child*, Research Reports 8/2001 (The Erik Castrén Institute of International Law and Human Rights, 2001) at 53-6.

43 Committee on the Rights of the Child, supra n 3. The characterisation of best interests as a threefold concept is similar to the characterisation presented by the former chair of the Committee Jean Zermatten in 2010 before the General Comment was issued: see Zermatten, supra n 40.

44 Committee on the Rights of the Child, supra n 3 at paras 6a-6c.

45 Ibid. at para 4.

46 Ibid. at paras 46-79.

47 Ibid. at paras 80-84.

The function of the concept as a substantive right has been criticised in earlier research. Based on a textual analysis of Article 3(1), Kilkelly has questioned whether the best interests provision contains a right at all; instead, the provision's value is practical and lies in persuading decision-makers about the importance of a rights-based approach to children's issues in contexts where the language of human rights is not possible. The language of 'best interests' may represent a soft approach and, therefore, be a strategic way of advancing children's issues, especially in politically sensitive contexts.[48] Cantwell has criticised use of 'best interests' as a 'trump card', arguing that a provision focused on children's interests should not exist in a convention that otherwise guarantees rights. Cantwell does not, however, see the best interests provision as entirely unnecessary. According to him, the provision can be useful in certain circumstances, though not as widely as often advocated; it can be helpful, for example, when the decision-maker has to choose between two good options that are both in accordance with the rights of the child. Of these two options, the one that best fulfils the child's best interests must be chosen.[49]

The second dimension identified by the Committee, best interests as an interpretive principle, seems similar to the function Cantwell attributes to the concept: when more than one interpretation exists, the one that best respects the best interests of the child should be chosen. Formulated as the Committee puts it, the interpretive function seems to require a substantive best interests determination. This raises the question about the relationship between the interpretive and substantive functions—and, ultimately, about what the interpretive status actually entails. Kilkelly has noted that the Committee 'says very little' about the concept as an interpretive tool.[50]

It is important to note, however, that the interpretive function can have potential too for aligning best interests with the rights of the child. The interpretive function becomes important in situations where the child's rights can be maximised or when two rights or interests of the same child compete against each other, for example, in cases of adoption in which best interests must be a paramount consideration, according to Article 21 of the CRC. It can also help interpret other international obligations in a child rights compliant manner, as Pobjoy has argued regarding the Refugee Convention.[51] In the ECtHR jurisprudence, the interpretive function can be understood to mean construing ECHR obligations so that if several options are available, the one that best respects the best interests of the child should be chosen.[52] It is, however, difficult to see how the

48 Kilkelly, supra n 39 at 64-6.

49 Cantwell, 'Are Children's Rights Still Human?' in Intervenizzi and Williams (eds), *The Human Rights of Children. From Visions to Implementation* (2011) at 37; Cantwell, supra n 41 at 69-70.

50 Kilkelly, supra n 39 at 61-2; cf Wandenhole who considers the interpretive function as potentially powerful, see 'Distinctive characteristics of children's human rights law' in Brems, Desmet and Wandenhole (eds), *Children's Rights Law in the Global Human Rights Landscape. Isolation, Inspiration, Integration?* (2017) 21 at 26.

51 Pobjoy, *The Child in International Refugee Law* (2017) at 80-1, 124; Convention relating to the Status of Refugees 1951, 189 UNTS 137.

52 See, for example, *A and B v Croatia* Application No 7144/15, Merits and Just Satisfaction, 20 June 2019, at joint dissenting opinion of Judges Sicilianos, Turkovic and Pejchal, para 34, where the dissenting judges suggest that when deciding whether the Court should depart from a principle established in a previous judgment, it 'should be guided by the principle of the best interests of the child, in all of its three aspects, as a substantive right, as an interpretative principle and as a rule of procedure'.

best interests concept could function as an interpretive principle when child's interests conflict with other rights and interests. In other words, the function as an interpretive principle does not seem useful in situations where the child's human rights must be limited. This excludes a significant number of situations as court cases often concern limiting rights.[53]

Given that two of the three dimensions outlined by the CRC Committee do not sufficiently clarify the nature of best interests, the threefold concept understanding of the concept does not seem particularly helpful. The substantive right dimension of the best interests provision shifts focus to the rights of the child, which accords with the object and purpose of the CRC. However, if considering best interests means considering relevant rights, it is difficult to see why the best interests provision is needed in the first place. At the same time, understanding the provision as an interpretive principle also does not seem to add value when rights conflict. In these situations, the problem from the perspective of children's rights is often not identifying which alternative is best for the child in question; instead, the problem tends to be that other rights or interests, such as the State's interest in controlling immigration, are seen to weigh more heavily than the rights of the child. Conceptualising the situation from the perspective of what is best for the child does not offer practical tools to the decision-maker. However, the third dimension of the best interests concept is more promising.

B. Or (Mainly) a Procedural Obligation?

Perceiving best interests as a procedural rule is the third function identified by the Committee. I argue that the most reasonable interpretation of best interests is to understand Article 3(1) as imposing a procedural obligation to consider the best interests of the child in any decision-making process concerning children. This interpretation is in line with Article 31(1) of the Vienna Convention on the Law of Treaties,[54] which postulates that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose. If Article 3(1) of the CRC is examined carefully, its main content is the obligation to consider the best interests of the child in all cases concerning children, which implies a procedural obligation. Interpreting the best interests provision as a procedural obligation also receives support from the title of the General Comment concerning best interests, which is 'the right of the child to have his or her best interests taken as a primary consideration'. The obligations of States parties identified in the General Comment to ensure that best interests are consistently applied in every action taken by a public or private institution and to ensure that decisions, policies and legislation demonstrate that best interests have been a primary consideration are also best understood as procedural in nature.[55]

In practice, a procedural approach means that when a court conducts a best interests assessment, it does not substantively assess which outcome is in the best interests of the child in question but instead reviews the procedure that led to the outcome.

53 On the ECtHR system of limiting rights, see, for example, Letsas, 'The scope and balancing of rights. Diagnostic or constitutive?' in Brems and Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2013) 38.

54 1969, 1155 UNTS 331.

55 Committee on the Rights of the Child, supra n 3 at para 14.

Understanding the best interests provision as a procedural obligation means shifting the focus on whether best interests have been considered in the decision-making process. According to this interpretation, not giving adequate consideration to the child's interests could, consequently, be grounds for challenging the decision in front of a court. When perceived as a procedural obligation, the obligation to consider best interests in all actions concerning children becomes central. The debate about what it means to take best interests as a 'primary' or 'paramount' consideration[56]—which was also one of the most discussed issues during the drafting of Article 3[57]—becomes less meaningful as the substantive assessment focusing on the relevant rights of the child is distinguished from the weight of best interests. Taking a procedural approach to best interests does not mean that substantive considerations are set aside but rather that the substantive assessment should be articulated in terms of the rights of the child whereas the best interests assessment should focus on procedural factors.

The understanding of best interests as a procedural obligation has gained some support in previous research. Abramson has examined the drafting process of the CRC and argued that no careful analysis was conducted during the process regarding whether the provisions declared as 'general principles' in fact contained a principle. Abramson claims that Article 3(1) does not contain a principle but a procedural rule prescribing a step in the decision-making process.[58] Kilkelly is sceptical of the added value of Article 3(1) but argues that if it contains a right, that right is procedural.[59] Leloup has proposed that in expulsion cases of the ECtHR where the deportee is the parent, relying on a procedural approach would allow the Court to safeguard sufficiently those interests while also retaining consistency. Leloup claims that the inconsistency in the current expulsion case law stems from the Court's practice of conducting substantive best interests assessments based on the child's age, country ties and family bonds.[60] Concerning argumentation at the national level, Langrognet asserts that French administrative judges could interpret Article 3(1) as a procedural rule in addition to seeing it as a substantive right. This would lead the judges to examine if Article 3(1) has been violated regardless of whether the parties have relied on the provision. This would significantly broaden the protection of children's rights.[61] Furthermore, Popelier and Van De Heyning have analysed judicial and administrative decisions and found that in cases concerning the interests of a child in particular, the ECtHR has accentuated the importance of procedural guarantees.[62]

The following sections discuss the procedural approach to the best interests of the child in ECtHR case law to illustrate how the best interests concept may be understood

56 For example, Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities' in Sutherland and Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (2016) 21 at 33.

57 For example, Considerations 1981 Working Group, E/CN.4/L.1575 at para 22.

58 Abramson, 'Article 2. The Right of Non-Discrimination' in André et al. (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (2008) 1 at 65-6.

59 Kilkelly, supra n 39 at 59-66.

60 Leloup, supra n 15 at 413-15; Leloup, 'The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency' (2019) 37 *Netherlands Quarterly of Human Rights* 50 at 62-6. See also Smyth, supra n 13.

61 Langrognet, supra n 4 at 574.

62 Popelier and Van De Heyning, supra n 1 at 13.

as a procedural obligation in concrete cases. Three different layers are identified according to the intensity of the ECtHR's scrutiny. These layers are drawn from Brems' categorisation concerning the three types of substance-flavoured procedural review.[63] The first, and least intense, approach covers situations in which the ECtHR acknowledges that in cases concerning children, a best interests assessment is required to satisfy the requirements of the relevant substantive ECHR Article. The second approach requires not only that a best interests assessment is conducted but also that the assessment is of good quality. Requirements as to what constitutes sufficient quality are not specified in detail. In the third approach, the requirements of a substantive ECHR Article are met when the best interests of the child have been considered, the consideration is of good quality and specific elements identified by the Court have been taken into account by national authorities.

4. LAYERS OF A PROCEDURAL APPROACH TO THE BEST INTERESTS OF THE CHILD IN THE EUROPEAN COURT OF HUMAN RIGHTS

A. Best Interests Consideration as a Procedural Obligation

In the first approach related to the best interests of the child as a procedural obligation, the ECtHR acknowledges that in cases concerning children, a best interests consideration is required in order to satisfy the requirements of the ECHR Article in question. In other words, not considering the best interests of the child in a case concerning children could constitute a violation of the substantive Article (negative inference);[64] and, conversely, a thorough assessment could lead to finding a non-violation (positive inference).[65]

Conceptualising best interests assessment as a procedural obligation is already quite far-reaching, not least because the ECHR does not contain an obligation to consider the best interests of the child. The ECtHR, however, has developed a vast body of case law related to the best interests of the child and emphasised in several case groups the importance of considering the best interests of the child and the need to interpret the ECHR in accordance with the CRC.[66] It can be argued that the norm already has an established status in the case law. As illustrated in the following sections, a lack of consideration of best interests has led to a violation in many ECtHR cases decided under Article 8. Furthermore, all the States parties to the ECHR have ratified the CRC, which can be considered to demonstrate the existence of a European consensus on the obligation to assess best interests in all cases concerning children.[67]

The ECtHR usually refers to the best interests of the child in Article 8 cases. In some case groups decided under Article 8, such as child protection and adoption

63 See above at Section 2; Brems, supra n 12 at 35-7.

64 Naturally, this does not always need to be the case; children's rights and interests may be outweighed by other interests and rights even when adequately identified.

65 For example, *Leonov v Russia* Application No 77180/11, Merits and Just Satisfaction, 10 April 2018, concerning the residence of the applicant's child.

66 For example, *Harroudj v France* Application No 43631/09, Merits and Just Satisfaction, 4 October 2012 at para 42; *KT v Norway* Application No 26664/03, Merits, 25 September 2008 at para 43; *X v Latvia* Application No 27853/09, Merits and Just Satisfaction, 26 November 2013 at para 96.

67 Ratification of a treaty can be considered a constituent of the consensus. See, for example, Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015).

cases, the ECtHR has identified Article 8 as having a procedural limb. The procedural limb requires the decision-making process in administrative and judicial proceedings to be fair and to respect the interests protected by Article 8.[68] The identification of a procedural limb is remarkable because the text of Article 8 does not refer to any procedural guarantees. Attaching procedural guarantees to Article 8 essentially accords new rights to applicants in cases that do not fall under Article 6, which protects the right to a fair trial. Traditionally, the focus of the procedural limb of Article 8 has been on parents' rights to be involved in the decision-making process to a degree sufficient to provide them with a requisite protection of their interests,[69] and it is still not self-evident whether children have procedural rights under Article 8.[70] It seems, however, that the focus has recently shifted from protecting the interests of the parents to protecting the procedural rights of the children concerned too.[71]

An early case where the finding of an Article 8 violation was essentially based on the procedure is *W v United Kingdom*, in which the child had been placed in long-term care with a view to adoption. The applicant father complained about the procedures applied to reach the decisions to restrict, and then terminate, his access to his son, as well as about the remedies available. The State did not accept that such procedural matters were relevant to Article 8, but the ECtHR held that, while Article 8 contains no explicit procedural requirements, the decision-making process 'clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary'. The Court explicitly held that factors such as length of proceedings and availability of remedies could be significant. In the reasoning, the emphasis was on the interests of parents to be involved in the decision-making process.[72]

In more recent child protection cases, the procedural limb of Article 8 is evident, and the consideration of the child's best interests is established as an element belonging to the procedural limb. In cases concerning taking children into care, the Court considers that the procedural limb requires that decision-making procedures be fair and all parties be given a possibility to be heard or otherwise sufficiently involved. In *RMS v Spain*, which concerned the removal of the applicant's daughter with a view to her adoption, the Court expressed that its role is to ensure whether domestic authorities have, in applying and interpreting the applicable legal provisions, secured the guarantees set forth in Article 8, fulfilled their positive obligations and taken account of the child's best interests.[73] In *Lazoriva v Ukraine*, an adoption case where the applicant's nephew had been adopted by a couple not related to the family, the ECtHR found that domestic courts had failed to clarify why the adoption better served the child's interests than the tutelage that the applicant intended to establish. This failure was crucial; the

68 *Elita Magomadova v Russia* Application No 77546/14, Merits and Just Satisfaction, 10 April 2018 at para 57.

69 *W v United Kingdom* Application No 9749/82, Merits, 8 July 1987 at para 64.

70 Kilkelly argued in 2015 that procedural rights for children have not yet been developed: see Kilkelly, supra n 14.

71 For example, *Lazoriva v Ukraine* Application No 6878/14, Merits and Just Satisfaction, 17 April 2018.

72 *W v United Kingdom*, supra n 69 at paras 59-70. See also *McMichael v United Kingdom* Application No 16424/90, Merits and Just Satisfaction, 24 February 1995, where the non-involvement of parents in the proceedings led to a violation.

73 Application No 28775/12, Merits and Just Satisfaction, 18 June 2013 at para 72.

comparison of adoption and tutelage was arguably relevant to an assessment of what constituted the child's best interests, which was the principal question in the adoption proceedings. Consequently, 'the interference with the applicant's private life was not in compliance with the procedural requirements implicit in Article 8'.[74]

In addition to child protection and adoption cases, examples of integrating best interests into assessments of whether procedural obligations have been followed can be found in other case groups as well, such as immigration cases. In *MPEV and Others v Switzerland*, where the father of a family faced the risk of expulsion, the Court identified best interests as 'a primary consideration for the public authorities in the assessment of the proportionality for the purposes of the Convention'. A violation of Article 8 was found essentially for procedural reasons: the Court was not convinced that sufficient weight had been attached to the child's best interests as no reference to them had been made on the national level. The national court had held that the relationship between the father and child did not fall under the protection of family life within the meaning of Article 8 and consequently had seen no need to refer to the child's best interests. In fact, an assessment of the child's situation had been made, which found that sending her back to Ecuador would amount to an 'uprooting of excessive rigidity', given her integration into Swiss society, lack of knowledge about her country of origin, where she had never returned after the age of two, and very limited Spanish. However, the Court, referring to Article 3 of the CRC, was nevertheless not convinced that sufficient weight had been attached to her best interests.[75]

In another expulsion case, *Guliyev and Sheina v Russia*, the Court unanimously found a violation of Article 8 because domestic courts had not carefully balanced the interests involved, including the best interests of the children. Nor had they made a thorough analysis of the proportionality of the expulsion of the father of the family and the impact of the expulsion on his family life. The applicant father had three children, but because he had not been officially registered as their father before the decision to remove him had been taken, domestic courts had refused to consider the case from the perspective of family life. When listing general considerations and relevant principles in expulsion cases, the Court expressly mentioned that the best interests of the child must be assessed in the context of the removal of a non-national parent 'in order to give effective protection and sufficient weight to the best interests of the children directly affected by it'.[76] The case clearly indicates that failure to consider children may lead to a violation of Article 8. On the other hand, the procedural failure in this case was so blatant that the case does not provide tools for assessing the quality of the procedure in other circumstances, other than that domestic courts must take into account the considerations and principles elaborated by the Court.

In child abduction cases, the Court does not usually view the lack of a best interests assessment as indicating a violation. In *Andersena v Latvia*, for example, the ECtHR

74 *Lazoriva v Ukraine*, supra n 71 at paras 69-70. The case was unanimous, but Judges De Gaetano and Yudkivska underlined in their concurring opinions that regardless of the procedural violation, the outcome of the case was substantively in the child's best interests.

75 Application No 3910/13, Merits and Just Satisfaction, 8 July 2014 at paras 52, 57-59.

76 Application No 29790/14, Merits and Just Satisfaction, 17 April 2018 at paras 50-60.

underlined the need to take the Hague Convention[77] into account when assessing best interests in cases concerning the child's return. It held that 'the domestic courts' dismissing certain information and evidence as irrelevant to the particular proceedings cannot be taken to imply that the best interests of the child were disregarded'.[78] However, in *Royer v Hungary*, the ECtHR considered it positive that domestic courts had adequately considered the best interests of the child when deciding that a young child well integrated into his new environment should not be returned.[79] The case law is not entirely consistent, but the ECtHR seems to value the Hague Convention's rebuttable presumption of a speedy return of the child. This approach is procedural, too, because it suggests that following a certain procedure—returning the child—respects the child's interests.[80]

The procedural limb of Article 8 is different from the requirement expressly to consider the best interests of the child, but, as discussed above, the ECtHR often views the best interests consideration as an element of the procedural limb of Article 8. So far, this approach has covered some Article 8 cases only, but there are no barriers to broadening the approach to other ECHR Articles as well. As Leloup has argued, a procedural approach to considering the best interests of the child—instead of applying the concept as a substantive right—would allow the Court to apply the principle in all cases irrespective of the right at issue. If the Court only has to verify whether due consideration was afforded to the interests of the child in a given case, no balancing is required and making a comparable assessment between different ECHR provisions becomes easier.[81]

B. Quality of a Best Interests Consideration

The approach described in the previous section, which requires national authorities to consider best interests in cases concerning children, is already progressive. In some cases, however, the ECtHR has gone even further. In addition to requiring a best interests consideration to satisfy the requirements of the substantive ECHR Article in question, the Court has on several occasions postulated that a mere consideration of best interests is not enough; the consideration also needs to be of good quality.

An example of this approach can be found in the child protection case *ML v Norway*, where the ECtHR concentrated on the national authorities' reasoning about why they had not seen the applicant mother's parents as suitable foster parents for her son. The authorities had 'conducted an in-depth examination of the entire family situation and the factors relevant to the case'. The Court was 'therefore satisfied that the domestic court carried out a balanced and reasonable assessment of the respective interests of each person, while exercising constant care to determine what would be the best

77 See Hague Conference on Private International Law, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

78 Application No 79441/17, Merits and Just Satisfaction, 19 September 2019 at para 119.

79 Application No 9114/16, Merits and Just Satisfaction, 6 March 2018 at paras 60-63.

80 See also Keller and Heri, 'Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights' (2015) 84 *Nordic Journal of International Law* 270.

81 Leloup, supra n 15 at 415-16. The observation is made in the context of cases where the parent of the child has been expelled, as the ECtHR assesses some of the cases under Article 3 and some under Article 8 ECHR.

solution' for the child concerned. Consequently, no violation was found.[82] In *Petrov and X v Russia*, where the issue was the child's residence, the Court referred to the same principles and held that a failure to make a sufficiently thorough examination would amount to a violation of Article 8.[83] In *Petrov*, the child had not been duly heard, an expert assessment had not been conducted and domestic courts had not sufficiently explained why they had arrived at the conclusion that they reached in the case. In addition, domestic courts had refused to take into account evidence advanced by the applicant. The Court concluded that, because the examination had not been sufficiently thorough, 'the decision-making process was deficient and did not therefore allow the best interests of the child to be established'. A violation of Article 8 was found. According to the minority, the proceedings' deficiencies were insufficient to result in a violation.[84]

Although not a Court judgment, another example of a quality-focused procedural approach to assessing best interests is the dissenting opinion in *Ndidi v United Kingdom*.[85] In *Ndidi*, the applicant had had a child after a deportation decision was issued because of crimes, some committed as a minor. The majority of the ECtHR relied on the assessment by the national courts and found no violation of Article 8. However, the dissenting opinion disagreed that national courts had properly assessed the best interests of the child. Even though a reference to best interests had been made, the national court 'failed to explain what was considered to be in the child's best interests, what criteria this was based on and how the child's interests were weighed against other considerations'. The dissenting judge specified that the requirement of according primary importance to the child's interests does not necessarily mean that a proportionality test—including a best interests assessment—would have led to a different conclusion from the one reached by national courts. The dissenting opinion suggests that the domestic courts' failure to assess best interests adequately should alone constitute a procedural violation of Article 8.[86] The dissenting opinion demonstrates that the ECtHR judges do not always share the same views and the Court could have followed a different path. In this case, the majority relied on national decision-making whereas the minority called for a more thorough examination.[87]

The ECtHR has sometimes emphasised the need to interpret the best interests of the child in accordance with the CRC, which can be considered as an indication of the assessment quality. In the family reunification case *Senigo Longue and Others v France*, the ECtHR paid attention to national authorities' obligation to take the child's best interests into account when assessing the proportionality of a measure. The Court also noted that international conventions, notably the CRC, have to be taken into account in the balancing. In *Senigo Longue*, these considerations led the Court to conclude that the respondent State should have followed a procedure that would have taken the

82 Application No 43701/14, Merits and Just Satisfaction, 7 September 2017 at para 58.

83 See also *Elita Magomadova v Russia*, supra n 68 at para 63.

84 Application No 23608/16, Merits and Just Satisfaction, 23 October 2018 at paras 103-114 (by four votes to three; Judges Dedov, Lubarda and Poláčková dissenting).

85 Application No 41215/14, Merits and Just Satisfaction, 14 September 2017.

86 Ibid. at dissenting opinion of Judge Turković.

87 On the 'undercurrents' of case law and the significance of dissenting opinions, see Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (2015) at 17-20.

interests of the children, who were also applicants before the Court, into account.[88] In *El Ghatet v Switzerland*, another family reunification case, the authorities had examined the son's best interests, but they had done so 'in a brief manner and put forward a rather summary reasoning in that regard' without focusing sufficiently on his interests in their balancing exercise and reasoning. This was contrary to the requirements under the ECHR and other international treaties, such as the CRC in particular.[89] Therefore, a brief best interests consideration with a summary reasoning was not sufficient to satisfy the requirements of Article 8; the assessment needed to fulfil certain quality criteria.

Assessing the quality of decision-making is essentially based on how well-reasoned a decision or judgment is. The CRC Committee has emphasised the importance of reasoned decisions in the context of best interests assessment and determination. It has stated that the understanding of best interests as a procedural rule presupposes that

> the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.[90]

To be able to assess the quality of best interests considerations, ECtHR judges must possess enough information on how the judgment in question has been produced, as well as on the reasons behind it. A thorough reasoning is essential in this respect.

C. The Checklist Approach

In addition to observing that best interests have been considered and generally requiring that the consideration is of good quality, the ECtHR has, in some cases, expected that specific elements or 'checklists' are visible in the assessment. This means that the Court reviews whether national authorities have considered certain factors and done so with sufficient quality. The checklist approach may focus on different elements depending on the context. The Court has, for example, used last resort argumentation, paid attention to linking best interests consideration to relevant rights of the child and considered the content and weight of the child's views. In the following, these three forms of the checklist approach are presented.

The last resort argumentation, also called the less restrictive means test, is an example of a more specific requirement. In the context of child protection and alternative care, the Court expects national authorities to demonstrate that they have considered less restrictive measures before resorting to an option that limits the child's rights, such as taking the child into care, access restrictions or even involuntary adoption. All these interferences need to be in the best interests of the child to be justified. In established case law, an essential criterion according to Article 8 is that taking a child into care is

88 Application No 19113/09, Merits and Just Satisfaction, 10 July 2014 at paras 62-75.
89 Application No 56971/10, Merits and Just Satisfaction, 8 November 2016 at paras 51-54.
90 Committee on the Rights of the Child, supra n 3 at para 6(c).

a last resort measure.[91] In *Akinnibosun v Italy*, lack of considering other, less restrictive measures was decisive for finding a violation of Article 8. The applicant father was a Nigerian national who had received a residence permit in Italy for humanitarian reasons. The daughter had been taken into care at the age of two as she seemed traumatised (which was not surprising given her history, which included arriving in Italy by boat with the father).[92] Similarly, in *Zhou v Italy*, the focus was on whether national authorities had taken all the necessary measures to allow the child to live with his mother before proceeding to adoption.[93] In *Wunderlich v Germany*, which concerned homeschooling, the domestic courts had given detailed reasons why measures less severe than taking the children into care were not available in a situation where the parents had failed to comply with compulsory school attendance. The decisions to withdraw parts of the parents' authority and to take the children into care were, therefore, proportionate.[94]

Another context in which the ECtHR regularly uses last resort argumentation is the detention of children. In *DL v Bulgaria*, where the applicant child had been held in an education centre, the Court found that an essential criterion in assessing the proportionality of the detention was whether the detention was a last resort measure, chosen in the best interests of the child.[95] Last resort arguments are often presented under Articles 5 and 8 of the ECHR when assessing the permissibility of immigration detention of children.[96] In *Bistieva and others v Poland*, where a mother and her three children had been detained pending their removal, the Court found a violation of Article 8 because the authorities had failed to provide sufficient reasons to justify the detention. This failure had two components: failure to give due consideration to possible alternative measures and 'serious doubts as to whether the authorities had given sufficient consideration to the best interests of the first applicant's three children, in compliance with obligations stemming from international law'.[97] In the first ECtHR case on immigration detention of children, *Rahimi v Greece*, the Court criticised the fact that when deciding on the detention of an unaccompanied 15-year-old child, national authorities had not addressed the question of the boy's best interests at all. In addition, they had not researched whether placing him in detention was a last resort measure and whether less radical measures were available. Consequently, a violation of Article 5(1) was found.[98] *Rahimi* and the subsequent immigration detention cases form an exception to the rule that the procedural approach is currently used in the context of Article 8 only.[99] Best interests and the less restrictive means test are sometimes

91 *K and T v Finland* Application No 25702/94, Merits and Just Satisfaction, 12 July 2001 at para 168; Brems and Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 *Human Rights Law Review* 139 at 156-7.

92 Application No 9056/14, Merits and Just Satisfaction, 16 July 2015 at para 76.

93 Application No 33773/11, Merits and Just Satisfaction, 21 January 2014 at para 49.

94 Application No 18925/15, Merits and Just Satisfaction, 10 January 2019 at para 54.

95 Application No 7472/14, Merits and Just Satisfaction, 19 May 2016 at para 74.

96 Although, as Smyth has argued, examining the arbitrariness of immigration detention in the light of CRC rights could be a better path than relying on last resort argumentation. See Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children' (2019) 19 *Human Rights Law Review* 1.

97 Application No 75157/14, Merits and Just Satisfaction, 10 April 2018 at paras 69-88.

98 Application No 8687/08, Merits and Just Satisfaction, 5 April 2011 at paras 108-110.

99 See, for example, *HA and Others v Greece* Application No 19951/16, Merits and Just Satisfaction, 28 February 2019 at paras 204-208, concerning immigration detention of nine unaccompanied minors. The

presented as two separate grounds that count in the evaluation of the procedure, but they are often intertwined to the extent that consideration of less restrictive means is a component of the best interests assessment. In *GB and Others v Turkey,* the Court used the latter approach when noting that protecting the child's best interests involves considering alternatives so that the detention of minors is a measure of last resort.[100]

In addition to last resort argumentation, the ECtHR has presented the link between the best interests and specific rights of the child as demonstrating the quality of decision-making. The extent to which the ECtHR interprets ECHR obligations by focusing on the rights of the child has been strongly influenced by the CRC and the CRC Committee's rights-based approach.[101] This influence is reflected in references to other CRC Articles and the Committee's views, often General Comments. In *Maslov v Austria*, a landmark case concerning the expulsion of juvenile offenders, both last resort argumentation and linking best interests to rights were used. In *Maslov*, the Grand Chamber found that the obligation to take the best interests of the child into account included an obligation to facilitate reintegration. In the reasoning, reintegration, as an aim of the juvenile justice system, was linked to Article 40 of the CRC. The Court held that reintegration 'will not be achieved by severing family or social ties through expulsion, which must remain a means of last resort'. Expulsion of the applicant, who was a settled immigrant and had committed mostly non-violent crimes as a minor, did not fulfil these requirements and, therefore, breached Article 8.[102] In addition to reintegration, the Court has linked best interests to other rights, such as the child's right not to be separated from parents and maintain contact with them in child protection cases and immigration detention cases.[103]

A third element demonstrating the quality of a best interests assessment is the views of the children, as well as the weight attributed to those views. Guaranteeing children an opportunity to express their views and giving those views due weight is especially important in the current human rights framework because, according to the Committee, Article 3(1) of the CRC cannot be correctly applied if the requirements of Article 12 of the CRC on participation are not met. In other words, an outcome cannot be considered to be in a child's best interests if the child has not been provided with an opportunity to be heard or otherwise express her views. In the General Comment on Article 12, the Committee expressed that best interests 'is similar to a procedural right that obliges States parties to introduce steps into the action process to ensure that the best interests of the child are taken into consideration'. Hearing the child is one of

violation of 5(1) was based on the finding that national authorities had not sufficiently explained their actions. Reference is made to *Rahimi v Greece*, supra n 98, as well as to Article 3 CRC.

100 Application No 4633/15, Merits and Just Satisfaction, 17 October 2019 at para 186. Similarly, see *SHD and Others v Greece and Others* Application No 14165/16, Merits and Just Satisfaction, 13 June 2019 at para 69.

101 For example, *AV v Slovenia* Application No 878/13, 9 April 2019 at para 49, where the ECHR refers to General Comment No 14. See also Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 *Human Rights Quarterly* 308.

102 Application No 1638/03, Merits and Just Satisfaction, 23 June 2008 at paras 77-101.

103 For example, *NP v The Republic of Moldova* Application No 58455/13, Merits and Just Satisfaction, 6 October 2015 at para 42; *GB and Others v Turkey*, supra n 100 at paras 168 and 186.

these steps.[104] The Committee's view reinforces the link between Articles 3 and 12 and supports the understanding of Article 3 as a procedural obligation. Eekelaar and Tobin have suggested a general obligation of decision-makers to take all reasonable measures in light of available resources to obtain the child's views when determining best interests; if the views are not obtained, the decision-maker bears a heavy burden to justify why not.[105]

The ECtHR has recently placed emphasis on the child's wishes especially in child protection and custody cases. In *Zelikha Magomadova v Russia*, where the applicant had been deprived of her parental authority, the fact that domestic courts had heard none of the four children concerned contributed to the finding that the 'decision-making process was deficient and therefore did not allow the best interests of the children to be established'. Regarding the two younger children, the ECtHR also expressed that no expert opinion had been sought regarding whether they could be interviewed in court (assisted by a child psychologist, if necessary).[106] In *M and M v Croatia*, the applicants, mother and daughter, alleged that national authorities had failed to meet their positive obligations as they had not adequately prosecuted the father for the violence perpetrated against the daughter. In finding a violation of Article 8 on account of the child's non-involvement in the custody proceedings, the Court noted that the child had not been heard and her wish to live with her mother had not been taken into account. A violation of Article 3 of the ECHR was also found because domestic authorities had breached their procedural obligation to investigate allegations of ill-treatment towards the child's father effectively. The Court extensively analysed the relationship between Articles 3 and 12, CRC and referred to the General Comment on the right of the child to be heard and other CRC sources. As a general view, the Court expressed that 'in such cases it cannot be said that the children capable of forming their own views were sufficiently involved in the decision-making process if they were not provided with the opportunity to be heard and thus express their views'.[107]

It is important to note that whether the body being assessed is a national court or non-judicial decision-maker, such as administrative body, may have implications for the checklist approach. Administrative authorities cannot be expected to reason similarly to courts, which is why the criteria for their decision-making need to be less detailed than human rights scrutiny checklists for courts.[108] Moreover, a perfunctory application of a checklist can lead to substantively unfair outcomes and, because of this, checklists should be open to changes through further case law.[109] Consequently, there may be other elements indicating that a profound best interests assessment has taken place in addition to last resort argumentation, a link between best interests and rights, and the views of the child. The use of expert evidence, for instance, has been underlined by the ECtHR.[110] Eekelaar and Tobin assert that taking certain elements into account

104 Committee on the Rights of the Child, General Comment No 12 (2009): The right of the child to be heard, 20 July 2009 at paras 70-74. See also Committee on the Rights of the Child, supra n 3 at paras 43-45.

105 Eekelaar and Tobin, supra n 8 at 86.

106 Application No 58724/14, Merits and Just Satisfaction, 8 October 2019 at paras 114-119.

107 Application No 10161/13, Merits and Just Satisfaction, 3 September 2015 at paras 96-97, 176-187.

108 Brems, supra n 12 at 37; Sathanapally, supra n 21 at 72-3.

109 Brems, ibid. at 37.

110 For example, *AV v Slovenia*, supra n 101 at para 85.

reduces the indeterminacy of best interests. Such elements include considering the child's views, other rights under the CRC and international law, the views of parents and other relevant persons involved in the child's care, the child's individual circumstances, including developmental needs and social, religious and cultural practices, and relevant evidence.[111] These elements resemble those identified by the ECtHR and could be relevant for future development of the checklist approach.

5. CHALLENGES OF A PROCEDURAL APPROACH TO BEST INTERESTS IN THE EUROPEAN COURT OF HUMAN RIGHTS

Even though the ECtHR case law on the best interests of the child contains several examples in which the Court has relied on a procedural approach, the procedural approach is not without challenges. The main concerns and their possible answers are addressed in the following.

One might claim that the procedural approach is indeed the best approach in the ECtHR—yet not because of the nature of the best interests provision but because of the nature of the ECHR as a supranational court. It can be claimed that a substantive best interests assessment has to be conducted in cases concerning children by national authorities rather than the ECtHR. The ECtHR's review is different from that at the domestic level; the ECtHR is an international court premised on the principle of subsidiarity, and, hence, it differs from national authorities, especially from those who are the first to make a best interests assessment in a specific case. In addition, the ECtHR operates with a margin of appreciation based on the idea that because national authorities are closer to the case, they are better placed to make fact-based assessments and to give an opinion on the exact content of the requirements, as well as on the necessity of restrictions.[112] To preserve its legitimacy, the ECtHR must find ways to respect national decisions while safeguarding fundamental and human rights.[113] Procedural arguments might be more readily accepted at the national level. As the focus on the procedure is an inevitable characteristic of the ECtHR system, this article's examination of ECtHR case law may give too optimistic a view of how a procedural approach to best interests operates in practice.

However, it is equally possible to argue—as this article does—that Article 3 of the CRC is best understood as a procedural obligation. From this it follows that national courts should also focus on the procedural obligation to conduct a best interests assessment, review whether such an assessment has taken place and examine its quality through indications of quality, such as whether the child has had an opportunity to express her views and whether those views have been accorded due weight. In a case where a parent has received an expulsion order, for example, it is the immigration service or other similar authority who has to assess substantively the impact of the measure on the child(ren) concerned. Instead of referring to best interests, the immigration service could articulate the substantive assessment with reference to the child's rights.

In addition to the implications of the position of the ECtHR as an international court, another concern of an entirely procedural review is that substantive argumen-

111 Eekelaar and Tobin, supra n 8 at 85-95.

112 *Handyside v United Kingdom* Application No 5493/72, Merits, 7 December 1976 at para 48.

113 Sathanapally, supra n 21 at 62.

tation related to the rights of the child risks becoming weaker. If the ECtHR focuses on procedural review in the strict sense, without paying any attention to the quality of the assessment, this may produce superficial argumentation by national authorities who might refer to best interests without really considering them and conduct a shallow assessment to satisfy the Court. Todres has criticised a procedural interpretation of best interests as weakening Article 3(1).[114] Furthermore, it has been argued that a procedural approach contributes to a diluted protection of vulnerable groups in the ECtHR.[115] To prevent human rights protection from weakening, it is crucial that procedural review does not become a formality in which a reference to the best interests of the child suffices without the Court examining whether the best interests assessment is genuine.[116] From this perspective, the Court's focus on the quality of best interests assessment and the checklist approach seem more reliable as they combine elements of procedural and substantive protection.

Another, more subtle problem related to the use of procedural review is the difficulty of distinguishing between procedural and substantive reviews. Though the two are conceptually different, in practice it may prove difficult to draw the line between them, given that quality of the review is important. In the ECtHR, guaranteeing the quality of the procedural review requires assessing whether the factors national authorities have linked to the best interests assessment, such as the child's age, are acceptable. This shifts focus away from a purely procedural review, raising the question of whether a purely procedural review is even possible. This question is not only theoretical; in the context of the ill-treatment of children, O'Mahony has argued that distinguishing between procedural and substantive violations is crucial to characterising the failure of the State and, consequently, to understanding what the execution of the judgment requires.[117]

Furthermore, it is important to note that the ways the ECtHR currently utilises the procedural approach—or the categorisation presented in this article—are not the only possible form of procedural review. The ECtHR could, for example, increasingly give attention to the requirements that legislation or national legislative processes have to fulfil, which is an approach it has applied in some other areas but also concerning the best interests of the child. As an illustration, automatically depriving a mother of her parental rights as a consequence of a criminal conviction without assessing the interests of justice and those of her children was considered problematic.[118] The previously discussed suggestions by Eekelaar and Tobin regarding the elements reducing indeterminacy can be useful in defining future requirements.

114 Todres, 'Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law' (1998) 30 *Columbia Human Rights Law Review* 160 at 176.

115 Cumper and Lewis, 'Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court of Human Rights' (2019) 68 *International and Comparative Law Quarterly* 611; Nieminen, 'Eroding the protection against discrimination: The procedural and de-contextualized approach to S.A.S. v France' (2019) 19 *International Journal of Discrimination and the Law* 69.

116 Similarly, see Leloup, supra n 60 at 65-6.

117 O'Mahony, 'Child Protection and the ECHR. Making Sense of Positive and Procedural Obligations' (2019) 27 *International Journal of Children's Rights* 660 at 677.

118 *MD and Others v Malta* Application No 64791/10, Merits and Just Satisfaction, 17 July 2012 at paras 77-80. See also Gerards, supra n 8 at 131-6.

6. CONCLUSION

This article has claimed that Article 3(1) of the CRC should be understood as a predominantly procedural obligation, compelling decision-makers to consider the best interests of the child in all cases concerning children. This claim concerns the ECtHR in particular, but the article has argued that understanding Article 3(1) as a procedural obligation is beneficial in general, as a procedural approach allows the circumvention of several problems that originate from interpreting the provision as a substantive right. The wording of Article 3(1) supports such an interpretation, which is also in accordance with the object and purpose of the CRC. In decision-making, a procedural approach to best interests allows for a consistent application of the concept in different case groups. Instead of conducting a substantive best interests assessment, decision-makers could focus on the rights of the child.

To illustrate how a procedural approach to best interests may look in practice, the article presented a categorisation of three layers of the procedural approach to the best interests of the child in the ECtHR, building on Brems' categorisation. The intensity of the procedural review varies at the ECtHR. In the first approach, the Court requires a best interests consideration to satisfy the requirements of the substantive ECHR Article. In the second, the Court pays attention to the quality of the best interests assessment. In the third, and most specific, approach, the checklist approach, the Court requires national authorities to show that they have considered less restrictive measures, linked best interests to the child's rights or taken the child's views into account when assessing best interests. This categorisation shows that in some cases, the ECtHR has created far-reaching obligations for States to show that they have considered the best interests of the child. It is, however, important to underline that the growing use of the procedural approach is not the full picture; the Court still relies on the substantive approach too.

At present, there are significant differences between case groups in how accentuated procedural obligations are in ECtHR cases concerning the best interests of the child. Even though the procedural approach is promising, the Court is not fully consistent with its approach on best interests as a procedural obligation, either.[119] In some case groups, such as child protection cases, the ECtHR recognises the existence of a procedural limb to Article 8. In others, such as immigration cases, the Court has thus far refrained from expressly articulating the existence of the procedural limb of Article 8, even though a lack of consideration of best interests can lead to a violation in immigration cases too. In *W*, the early child protection case discussed earlier, a particularly interesting aspect of the reasoning is how the ECtHR justified the decision to recognise procedural aspects under Article 8. The Court noted that because the topic is so sensitive, the task of local authorities is already extremely difficult and to require them to follow inflexible procedures would complicate the matter. Therefore, a measure of discretion must be allowed. On the other hand, the Court noted that 'predominant in any consideration of this aspect of the present case must be the fact that the decisions may well prove to be irreversible'. In *W*, the irreversibility resulted from the fact that the child had been taken away from his parents and placed with alternative carers.[120] Child protection cases are, however, not the only group of cases in which the decisions

119 See also Gerards, supra n 28 at 158-60.

120 *W v United Kingdom*, supra n 69 at para 62.

are often irreversible. Overall, cases concerning children are particularly irreversible regardless of their context, which speaks for the importance of a procedural approach in all case groups.

For an applicant before the ECtHR, arguing that the best interests of the child have not been taken into account in the decision-making process may be a more compelling argument than arguing that the outcome of the case is against the best interests of the child. As the Court already applies a procedural scrutiny on a rather regular basis, it could easily rely on its previous case law and tighten its already existing scrutiny by requiring national authorities to make a proper best interests assessment. Relying on procedural review more systematically when assessing the best interests of the child would improve the consistency of ECtHR case law and further a more consistent understanding of the best interests concept. It is, however, critical to pay attention to the quality of the assessment to safeguard the rights of children.

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A Focus on Domestic Structures: Best Interests of the Child in the Concluding Observations of the UN Committee on the Rights of the Child

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ABSTRACT

The views of human rights treaty bodies are essential in understanding key treaty provisions. However, the interpretations of the Committee on the Rights of the Child, the monitoring body of the United Nations Convention on the Rights of the Child, are mostly scattered in concluding observations that the Committee issues in response to states' periodic reports. Through systematic analysis, this article shows how the Committee conceptualises the best interests of the child, an important yet indeterminate concept for the children's rights framework and human rights law in general, in the concluding observations. The article argues that the Committee connects best interests to various recurring contexts. Most importantly, the Committee focuses on active measures through which states are supposed to implement the best interests of the child. These six cross-cutting themes—legislative measures, integration in practices, cooperation, awareness-raising and training, resources, and monitoring—correspond to the general measures of implementation that the Committee has previously identified, and they are used as a framework to analyse the concluding observations. The results demonstrate the importance of domestic structures in implementing human rights. They can also be interpreted as reflecting the Committee's understanding of best interests as a positive obligation.

KEYWORDS

Human rights treaty bodies; children's rights; UN Convention on the Rights of the Child; best interests of the child; UN Committee on the Rights of the Child; concluding observations; periodic reports; monitoring

Introduction

Examining periodic state reports is the main channel through which the United Nations Committee on the Rights of the Child (the Committee), the monitoring body of the United Nations Convention on the Rights of the Child (UNCRC), communicates its interpretation of the UNCRC to contracting states. Based on the reports, the Committee issues concluding observations that identify positive developments, issues of concern, and ways to correct problems.[1] Concluding observations are country-specific, but they also have relevance for the interpretation of the UNCRC in general.

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[1]Felice D. Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) 7 Human Rights Law Review 109, 127–28.

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This article analyses how the Committee addresses the concept of the best interests of the child in its concluding observations.[2] Because the obligation to consider the best interests of the child guaranteed in UNCRC Article 3(1) is an important yet indeterminate concept in the UNCRC and the human rights framework in general, it merits further study. While the monitoring mechanism of the UNCRC has received attention[3] and previous research exists on various UNCRC rights in the concluding observations,[4] so far the best interests concept in the concluding observations has not been comprehensively studied.[5] This means that a significant part of the Committee's interpretation of the concept remains unexamined. The UNCRC is not a product of consensus and it contains inconsistencies,[6] which makes analysing its obligations all the more important. As structuring state reports was the main reason why the Committee chose Article 3 as a general principle of the UNCRC, concluding observations are assumedly a good source for discovering how the Committee views the concept.

Although I knew that arriving at an all-encompassing definition of best interests would be impossible, I expected the concluding observations to add concreteness to the interpretation. It soon became clear, however, that the content of best interests escapes definition. The most overarching theme in the concluding observations is the active role of the state in implementing Article 3(1). Consequently, this article argues that the Committee connects the best interests of the child to various contexts but rarely defines the concept. Instead, the Committee focuses on active measures through which states are expected to implement it. The article identifies six cross-cutting themes – legislative measures, integration in practices, cooperation, awareness-raising and training, resources, and monitoring – that are used as a framework to analyse the concluding observations. These measures correspond to the general measures of implementation that the Committee has previously identified. The findings shed new light on the practices of human rights monitoring and underline the importance of domestic structures in implementing human rights. The results also suggest that the Committee views the best interests of the child as a positive obligation.

[2]The approach was inspired by Noam Peleg's analysis of the right to development in the UNCRC, see Noam Peleg, The Child's Right to Development (Cambridge University Press 2019) 92. However, Peleg's approach is broader than that of the current article as it covers general comments too.

[3]See e.g. Cynthia Price Cohen, Stuart N. Hart and Susan M. Kosloske, 'Monitoring the United Nations Convention on the Rights of the Child: The Challenge of Information Management' (1996) Human Rights Quarterly 439; Eugeen Verhellen (ed), Monitoring Children's Rights (Martinus Nijhoff 1996); Jutta Gras, Monitoring the Convention on the Rights of the Child, vol Research Reports 8/2001 (The Erik Castrén Institute of International Law and Human Rights, Forum Iuris 2001).

[4]See e.g. Sylvie Langlaude, 'Children and Religion under Article 14 UNCRC: A Critical Analysis' (2008) 16 The International Journal of Children's Rights 475; Laura Lundy, 'Children's Rights and Educational Policy in Europe: The Implementation of the United Nations Convention on the Rights of the Child' (2012) 38 Oxford Review of Education 393; Sarah Ida Spronk, *The Right to Health of the Child: An Analytical Exploration of the International Normative Framework* (Intersentia 2014); Kirsten Sandberg, 'The Convention on the Rights of the Child and the Vulnerability of Children' (2015) 84 Nordic Journal of International Law 221; Jill Stein, 'The Prevention of Child Statelessness at Birth: The UNCRC Committee's Role and Potential' (2016) 24 The International Journal of Children's Rights 599; Peleg (n 2).

[5]For a summary of best interests in concluding observations, see Elaine E. Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities' in Elaine E. Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge University Press 2016); for reflections on UNCRC general principles in recent concluding observations, see Karl Hanson and Laura Lundy, 'Does Exactly What it Says on the Tin?' (2017) 25 The International Journal of Children's Rights 285, 294–96. For a global index assessing the implementation of children's rights, including best interests, see kidsrightsindex.org. See also UNICEF, Implementation Handbook for the Convention on the Rights of the Child (UNICEF 2007).

[6]Ann Quennerstedt, Carol Robinson and John I'Anson, 'The UNCRC: The Voice of Global Consensus on Children's Rights?' (2018) 36 Nordic Journal of Human Rights 38.

Methodologically, the article analyses relevant parts of all 556 concluding observations the Committee has issued between 1993, when it began to consider reports, and 2019.[7] This comprehensive approach allows the identification of common denominators. The analysis addresses the Committee's criticism and recommendations together, as both reflect the Committee's understanding of the concept of the best interests of the child.[8] The study is not limited to issues discussed under Article 3 but extends to relevant issues under any article. Concluding observations based on separate reports concerning the two optional protocols to the UNCRC were not analysed due to reasons of scope and because the main provisions referring to best interests are in the main text of the convention. An analysis of state reports is also beyond the scope of the article.

Equally, an analysis of the general comment on best interests and other general comments falls outside the article's scope. The Committee has also guided the interpretation of the best interests concept in its general comments, the primary purpose of which is to guide states on interpreting the UNCRC.[9] In 2013, the Committee issued a general comment on Article 3(1) expressing its understanding of best interests as a 'threefold concept': a substantive right, an interpretive principle, and a rule of procedure.[10] This article focuses on concluding observations because despite the useful perspectives that general comments offer, they leave open central questions related to the interpretation of the concept, such as what its threefold nature means in practice and how best interests should be balanced in concrete situations.[11] Concluding observations can clarify these omitted aspects, as recommendations directed to individual states operate on a more concrete level. Despite this article's focus on concluding observations, it is important to remember that the interpretations expressed in the concluding observations should ultimately be considered alongside the views in the general comments.

The following section of the article introduces the role of concluding observations in monitoring the UNCRC. After that, I present the recurring contexts that the Committee connects to best interests. I then discuss the six cross-cutting themes; the contexts are presented first because the cross-cutting themes emerge from them. Finally, the article discusses the findings and their implications.

Concluding Observations in Monitoring the UNCRC

The Committee was established to examine states parties' progress in implementing the UNCRC (Article 43). Taking measures to advance implementation of the convention is an obligation that states commit to in accordance with Article 4 when ratifying. Like other UN human rights treaty bodies, the Committee's main activity is to consider state reports. States parties submit their reports to the Committee, indicating '… factors and difficulties, if any, affecting the degree of fulfilment of the obligations' and '… sufficient

[7]The jurisprudence has been followed until 16 December 2019.
[8]On the artificial distinction between subjects of concern and recommendations, see Gras (n 3) 138–39.
[9]On general comments of UN human rights treaty bodies, see e.g. Philip Alston, 'The Historical Origins of "General Comments" in Human Rights Law' in Laurence Boisson De Charzournes and Vera Gowland-Debbas (eds), *The International Legal System in Quest of Equity and Universality* (Brill 2001).
[10]Committee on the Rights of the Child, General comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1) (2013) CRC/C/GC/14, para 6.
[11]See e.g. John Eekelaar and John Tobin, 'Article 3. The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 84.

information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned' (Article 44).

Alongside these instructions in the UNCRC, specific guidelines regulate the structure of reports.[12] The initial guidelines of 1991 have been revised several times. Similar to the previous guidelines, the current version lists issues to be covered, such as clusters of rights, like 'general principles', but still leaves room for states to choose what to include in the reports.[13] After receiving a report, the Committee can request further information. It then issues concluding observations drafted by the secretariat together with the 'country rapporteur', a Committee member responsible for a certain state. Concluding observations mirror the structure of state reports and address both the Committee's concerns and suggestions for improvement.

In addition to considering reports, the Committee organises days of general discussion, issues general comments and handles individual communications.[14] By issuing general comments, the Committee can guide states further based on its findings from state reports.[15] The first general comment was given in 2001.[16] Geraldine Van Bueren observed in 1995 that from the point of view of reporting, the lack of general comments was problematic because no basic guidelines existed on, for instance, assessing whether an action or policy was in the best interests of the child.[17] The general comment on Article 3(1) was indeed issued in 2013, long after the article was declared a general principle.[18] Cynthia Price Cohen compared the implementation efforts without official guidelines to 'working in the dark'.[19]

A weakness of the UNCRC's monitoring system is that, like concluding observations by other human rights treaty bodies, the Committee's concluding observations are non-binding.[20] However, the status of treaty bodies as authoritative interpreters of treaty obligations gives the findings of those bodies a special status.[21] By ratifying the UNCRC, a binding international obligation, states parties have accepted that its content will be further determined by the Committee. The concluding observations have legal significance, and the Committee's interpretations take precedence over interpretations by states parties.[22]

[12]Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under art 44, para 1 (b), of the Convention on the Rights of the Child (3 March 2015) CRC/C/58/Rev.3.

[13]For a detailed overview of the content of reports and the reporting process, see Julia Sloth-Nielsen, 'Monitoring and Implementation of Children's Rights' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer Singapore 2019); see also Hanson and Lundy (n 5) 292–94.

[14]Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/66/138 of 19 December 2011, entered into force on 14 April 2014.

[15]Gaer (n 1) 118.

[16]Committee on the Rights of the Child, General Comment No 1: The Aims of Education (17 April 2001) CRC/GC/2001/1.

[17]Geraldine Van Bueren, *The International Law on the Rights of the Child* (Kluwer Academic Publishers 1995) 76; see also Sutherland (n 5) 45.

[18]CRC/C/GC/14 (n 10).

[19]Cynthia Price Cohen, 'The Jurisprudence of the Committee on the Rights of the Child' (1997) 5 Georgetown Journal on Fighting Poverty 201, 202.

[20]E.g. Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies before Domestic Courts' (2018) 67 International and Comparative Law Quarterly 201, 202.

[21]Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 Human Rights Law Review 27, 33–37.

[22]For the interpretive authority of human rights treaty bodies, see Martin Scheinin, 'The Art and Science of Interpretation in Human Rights Law' in Bård A Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Edward Elgar 2017) 27–30.

When interpreting the results of this study, it is necessary to bear in mind some weaknesses of the reporting procedure. First, the information in the state report is limited.[23] Already the 21,200 word limit restricts the amount of information these periodic reports can contain,[24] and states may create an illusion of progress by, for example, focusing on legislation and disregarding its application in practice.[25] Even though state reports are complemented by non-governmental organisation (NGO) shadow reports, the Committee is not well equipped to address questions it does not receive information about. Second, concluding observations given to different states are not directly comparable. This is partly because of the asymmetries in the information received but also because the areas examined for compliance and issues identified as subjects of concern vary.[26] Moreover, different types of bias, such as Western-centrism,[27] may affect the reporting process.[28] This study does not assess whether the Committee has correctly interpreted a situation in a certain country or whether the recommendations to various countries equate with each other. Third, the language of the reports, as that of other UN documents, is affected by a need to address controversial topics delicately, which may make it opaque.[29] The Committee walks a tightrope between endorsing states' efforts and communicating the required improvements.[30] Despite these limitations, the concluding observations contain valuable information that is not available elsewhere about the Committee's conceptualisation of the best interests of the child.

Recurring Contexts

From vulnerable groups to economic and social rights

This section discusses the first visible finding about how the Committee understands the concept of the best interests of the child in its concluding observations, which is that best interests are connected to several contexts. In the concluding observations, best interests are usually addressed under the title 'general principles' as well as in the context of relevant issues. Various issues are considered relevant, ranging from the prevention of honour killings[31] to the late working hours of parents.[32] The contexts overlap to some extent, and the country-specific references presented in this article are examples rather than a comprehensive account of all countries that have received a certain recommendation. The main concerns and recommendations are displayed in detail in Table 1.

The Committee has sometimes connected best interests to the other UNCRC general principles non-discrimination, participation, and the right to life, survival and

[23]Jaap E Doek, 'The CRC: Dynamics and Directions of Monitoring Its Implementation' in Antonella Intervenizzi and Jane Williams (eds), *The Human Rights of Children From Visions to Implementation* (Ashgate 2011) 102–03.
[24]CRC/C/58/Rev.3 (n 10) para 10; UN General Assembly, Resolution adopted by the General Assembly on 9 April 2014, A/RES/68/268, para 16.
[25]Gras (n 3) 113; Lundy (n 4) 398.
[26]Gaer (n 1) 127.
[27]Maria Grahn-Farley, 'Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the UN Convention on the Rights of the Child' (2008) 34 Brooklyn Journal of International Law 1.
[28]Valentina Carraro, 'The United Nations Treaty Bodies and Universal Periodic Review: Advancing Human Rights by Preventing Politicization?' (2017) 39 Human Rights Quarterly 943.
[29]Anna Holzscheiter, *Children's Rights in International Politics: The Transformative Power of Discourse* (Springer 2010) 95.
[30]Lundy (n 4) 398.
[31]Turkey (9 July 2001) CRC/C/15/Add.152, paras 31–32.
[32]Iceland (13 February 1996) CRC/C/15/Add.50, paras 19.

Table 1. Summary of issues that the Committee on the Rights of the Child connects to the best interests of the child.

Issue	Committee's views
General principles	
Non-discrimination (Article 2)	(1) Preventing gender-based discrimination and its root causes (ensuring effective implementation of UNCRC general principles with regard to the girl child; updating curricula to eliminate discrimination and gender stereotypes; diversifying children's educational and vocational choices; amending legislation dictating a different minimum marriage age for girls; taking legislative measures to prevent early marriage) (2) Preventing ethnic discrimination (e.g. towards Roma, aboriginal and indigenous and migrant children) by increasing cultural diversity and inclusiveness in education; combatting discrimination based on ethnic background, religion or the marital status of parents (e.g. amending custody legislation discriminating against children of unmarried parents) (3) Preventing discrimination against disabled children
Participation and views (Article 12)	Building mechanisms to ensure that the determination of best interests involves consultation with children (decision-making and legislation); hearing children in a child-friendly manner; creating structures that allow children to participate in public decision-making
Right to life, survival and development (Article 6)	Prioritising best interests over family ties when parents have been convicted of serious offences against their children and pose a risk
Children in vulnerable situations	
Children of imprisoned parents	Giving primary consideration to children's best interests in criminal proceedings concerning caregivers; avoiding sentences leading to separation; considering best interests when deciding whether children should live with the incarcerated parent; providing support to children whose parents have been sentenced to death; considering alternatives to the detention of mothers; supporting children to maintain contact with their imprisoned parent unless contrary to best interests
Children with disabilities	Considering best interests when deciding about placement in special schools; supporting parents in caring for their child; placing children with disabilities in institutions only as a last resort measure; providing children with access to justice and opportunities to express their views through age- and need-appropriate procedural accommodations when their best interests are determined
Migrant children	Taking best interests as a primary consideration in migrant cases (e.g. transfer of asylum-seeking children, refugee status determination, child's or parents' detention, return or deportation) and non-citizen children; not deporting or returning children without a formal best interests determination; taking best interests as a primary consideration in planning, implementing and assessing migration policies; creating a legal framework to protect refugee and internally displaced children; ensuring that best interests and views of children are taken into account in asylum procedures; appointing a guardian to unaccompanied minors; ensuring access to basic services to refugee children; dealing speedily with cases concerning family reunification and unaccompanied minors; ensuring that foreign children have a statutory right to family reunification without subsistence requirements; training professionals working with unaccompanied minors; prohibiting mass expulsions of the children of migrant workers; providing safeguards against refoulement; not detaining families without considering best interests; prohibiting detention of refugee and asylum-seeking children; considering expert opinions on the impact of the deportation of a parent on children
Children in street situations	Establishing a comprehensive strategy to prevent the phenomenon and to aid street children; giving due weight to children's views when conducting interventions; supporting family reunification (e.g. via programmes) or alternative care if in accordance with best interests; providing training to authorities and NGOs working with street children
Juvenile justice/children in conflict with the law	Taking best interests as a primary consideration for child victims and witnesses; guaranteeing children the right to testify before a court; prioritising best interests when deciding whether parents accused of abuse should have the right to represent their child; best interests as a basis for crime-prevention

(*Continued*)

Table 1. Continued.

Issue	Committee's views
	and combatting measures; 15 as the age of criminal responsibility; applying child-friendly procedures; adopting a comprehensive juvenile justice policy guided by best interests; using the deprivation of liberty as a last resort measure; monitoring and reviewing the deprivation of liberty; considering best interests in sentencing; separating children deprived of liberty from adult prisoners; not subjecting children to solitary confinement unless in their best interests and subject to court review
Sale and trafficking of children	Taking best interests into account in legal proceedings and cross-border efforts related to human trafficking; conducting a formal best interests determination for child victims of trafficking and sale; comprehensive measures to identify, protect and support child victims of trafficking; not returning children to a country where they would be at risk of being re-trafficked
Family and alternative care	
Divorce/ separation	Establishing mechanisms to protect the best interests of the child in cases of divorce; legislation allowing shared custody; basing custody decisions on best interests; enforcing child maintenance obligations
Alternative care	Comprehensive policy for children in need of alternative care; supporting families, especially disadvantaged and vulnerable; removals only as a last resort measure and after an assessment of best interests and views of the child conducted by a multidisciplinary group of experts; removal decisions made or reviewed by a judge; effective regular periodic review and complaints mechanisms for children in care; placing children outside the family for the shortest possible period; not using poverty as the sole justification for a removal; prioritising family-based alternative care over institutions; placing siblings in the same institution; monitoring and evaluating institutions; maintaining ties with both parents while in care; alternative care arrangements for asylum-seeking and refugee children
Adoption	Introducing best interests as a paramount consideration in adoption legislation; avoiding unreasonable delays in adoption procedures; ensuring adequate resources; ensuring that judges deciding about adoption have relevant information concerning the child and the adopting parents; preferring domestic adoption over intercountry adoption; providing appropriate legal guarantees in intercountry adoption to avoid sale and trafficking; monitoring adoptions and adoption policy (e.g. establishing a national register); annulling adoptions in exceptional cases only
Civil and political rights	
Right to an identity, right to know one's origins (Article 7)	Birth registration (measures ensuring birth registration, ensuring that adoptive parents cannot change the child's name without consent); access to information about one's origins (adopted children, children born through assisted reproduction technologies, e.g. surrogate mothers, children born out of wedlock who have not been recognised, anonymous births); right to a nationality (addressing discrimination related to granting nationality)
Right to privacy	Ensuring that legislation enabling the collection, storage and sharing of personal information about children and their families includes a requirement to consider best interests; giving the national data inspectorate a mandate to prevent parents from revealing private information about their children; protecting children's privacy in the media (related to the identification of child victims) and cooperating with the media
Physical integrity/violence and abuse	Supporting social workers to ensure that best interests are addressed in the referral mechanism for child victims of violence; considering best interests when establishing mechanisms to prevent and investigate abuse; imprisonment of parents who ill-treat their children may aggravate difficulties; awareness-raising campaigns to inform that perpetrators of child sexual abuse should be punished; prohibiting corporal punishment
Economic, social and cultural rights	
Right to health	Placing adolescents' best interests at the centre of all decisions affecting their health and development; access to youth-sensitive and confidential medical counselling and care and rehabilitation facilities without parental consent; not keeping children with mental disorders in institutions or hospitals without medical justification; legislation ensuring consideration of children's

(*Continued*)

Table 1. Continued.

Issue	Committee's views
	best interests and views when deciding about the mental health treatment of children below 16; prescribing drugs to children with attention deficit disorders and behavioural problems only as a last resort measure and after a best interests assessment; taking best interests into account in rehabilitation measures related to drug use of children and parents; reviewing legislation to safeguard the best interests of pregnant girls (decriminalising abortion or providing exceptions to abortion ban, allowing access to safe abortions and protecting from the risks of illegal abortions and forced adoptions); emphasising UNCRC general principles in HIV/AIDS policies and strategies and cooperating with local authorities; taking best interests as a primary consideration in the national health sector reform process; considering best interests in the negotiations of international trade-related intellectual property agreements that might negatively impact on the access to affordable medicines
Right to education	Preventing bullying in schools; making religious education optional; evaluating legislation that restricts wearing religious symbols and clothing in public schools
Adequate standard of living	Taking measures to prevent poverty; prioritising budgetary allocations to economically and geographically disadvantaged groups

development. Older concluding observations often address all the general principles together,[33] while newer ones tend to be more specific. Non-discrimination seems to be an underlying mindset even though it is not always expressly mentioned. Gender-based discrimination and ethnic discrimination often surface, especially in older concluding observations.[34] The Committee has also been concerned about discriminatory custody legislation and practices.[35] Concluding observations often reflect societal developments: discrimination against the children of unmarried parents features prominently in those issued in the 1990s[36] but is nowadays rarely mentioned. Though the Committee has sometimes underlined the connection between Articles 3 and 12,[37] doing so does not emerge as a remarkable theme; sometimes, especially in older concluding observations, the two articles are addressed together,[38] implying a close relationship. The need to hear children in a variety of contexts is visible, ranging from traditional issues such as adoptions,[39] to organising consultations with children prior to ratifying a trade and investment treaty.[40] The fourth general principle, Article 6, which guarantees the right to life, survival and development, is only occasionally connected to best interests.[41]

Several recommendations concern various groups of children in vulnerable situations and reflect an overall concern that best interests are not systematically considered in decisions regarding vulnerable children.[42] The groups are not always labelled vulnerable,

[33]Sri Lanka (2 July 2003) CRC/C/15/Add.207, paras 23–24.
[34]Lebanon (7 June 1996) CRC/C/15/Add.54, para 28; Panama (24 January 1997) CRC/C/15/Add.68, para 15; Myanmar (24 January 1997) CRC/C/15/Add.69, paras 14 and 34; Luxembourg (24 June 1998) CRC/C/15/Add.92, para 27; Venezuela (2 November 1999) CRC/C/15/Add.109, para 17; Canada (27 October 2003) CRC/C/15/Add.215, para 24; Turkmenistan (2 June 2006) CRC/C/TKM/CO/1, para 28; Moldova (20 October 2017) CRC/MDA/CO/4-5, para 36(c).
[35]Algeria (18 July 2012), CRC/C/DZA/CO/3-4, para 49(c); United Arab Emirates (30 October 2015) CRC/C/ARE/CO/2, para 47–48; Bhutan (5 July 2017) CRC/C/BTN/CO/3-5, para 16(a).
[36]Libya (4 February 1998) CRC/C/15/Add.84, para 12.
[37]Indonesia (26 February 2004) CRC/C/15/Add.223, para 46(a); Guinea (13 June 2013) CRC/C/GIN/CO/2, para 60(b).
[38]Lesotho (21 February 2001) CRC/C/15/Add.147, para 27; Nigeria (13 September 2005) CRC/C/15/Add.257, paras 34–35.
[39]Israel (4 July 2013) CRC/C/ISR/CO/2-4, para 28.
[40]New Zealand (21 October 2016) CRC/C/NZL/CO/5, para 13(c).
[41]France (23 February 2016) CRC/C/FRA/CO/5, paras 27–28.
[42]Belgium (28 February 2019) CRC/C/BEL/CO/5-6, para 17.

but vulnerability seems to be a common denominator in many contexts. The Committee has often commented on the children of imprisoned parents,[43] children with disabilities,[44] children in street situations,[45] children in conflict with the law,[46] and the sale and trafficking of children.[47] The situation of migrant children, especially the best interests consideration in asylum procedures, is a persistent concern.[48]

Family and alternative care is a field often connected to best interests. In the alternative care context, best interests have a dual function; the main rule is preventing child–parent separation unless a separation is necessary in the best interests of the child.[49] The Committee has concentrated on the need for criteria for removals[50] and on institutional care as a last resort option.[51] Moreover, the Committee has underlined the importance of the child maintaining ties with both parents and returning to families if that is consistent with best interests.[52] Best interests also arise in the context of adoptions, especially international, which are an 'exceptional alternative care option'.[53] Because an adoption is a final solution, giving a proper role to best interests is especially important.[54] The Committee has emphasised monitoring, avoiding delays, and preferring domestic to intercountry adoptions.[55]

The Committee does not focus on civil-political rights. Nevertheless, it has linked best interests to Article 7, which guarantees registration immediately after birth, the right to a name, the right to acquire a nationality and the right to know and be cared for by parents.[56] Another civil-political right that has received attention in newer concluding observations is

[43]Bolivia (11 February 2005) CRC/C/15/Add.256, para 40; India (7 July 2014) CRC/C/IND/CO/3-4, para 60; Iraq (3 March 2015) CRC/C/IRQ/CO/2-4, para 57(c).

[44]Luxembourg (29 October 2013) CRC/C/LUX/CO/3-4, para 37(a); Greece (13 August 2012) CRC/C/GRC/CO/2-3, para 51(d); Mexico (3 July 2015) CRC/C/MEX/CO/4-5, para 46(d).

[45]Costa Rica (21 September 2005) CRC/C/15/Add.266, para 52(a); Romania (30 June 2009) CRC/C/ROM/CO/4, para 85(c); Burundi (19 October 2010) CRC/C/BDI/CO/2, para 73(c); Serbia (7 March 2017) CRC/C/SRB/CO/2-3, para 43(d); Central African Republic (8 March 2017) CRC/C/CAF/CO/2, para 73; El Salvador (29 November 2018) CRC/C/SLV/CO/5-6, para 49.

[46]Bulgaria (24 January 1997) CRC/C/15/Add.66, paras 12 and 24; Kuwait (26 October 1998) CRC/C/15/Add.96, para 15; Czech Republic (18 March 2003) CRC/C/15/Add.201, para 27; New Zealand (11 April 2011) CRC/C/NZL/CO/3-4, para 56(d); Madagascar (8 March 2012) CRC/C/MDG/CO/3-4, para 66(c).

[47]Greece (2 April 2002) CRC/C/15/Add.170, para 77(c); France (22 June 2009) CRC/C/FRA/CO/4, para 86(d); Guinea-Bissau (8 July 2013) CRC/C/GNB/CO/2-4, para 67(i); Romania (13 July 2017) CRC/C/ROU/CO/5, para 43(b).

[48]Finland (13 February 1996) CRC/C/15/Add.53, para 15; Norway (21 September 2005) CRC/C/15/Add.263, paras 21–22; Sweden (26 June 2009) CRC/C/SWE/CO/4, para 28; Australia (28 August 2012) CRC/C/AUS/CO/4, 81(b); Canada (6 December 2012) CRC/C/CAN/CO/3-4, para 74(a); Nauru (28 October 2016) CRC/C/NRU/CO/1, para 24; Lebanon (22 June 2017) CRC/C/LBN/CO/4-5, para 37(a); Denmark (26 October 2017) CRC/C/DNK/CO/5, para 39(d); Japan (5 March 2019) CRC/C/JPN/CO/4-5, para 42.

[49]Djibouti (28 June 2000) CRC/C/15/Add.131, para 34; Haiti (18 March 2003) CRC/C/15/Add.202, para 39(a); Sweden (26 June 2009) CRC/C/SWE/CO/4, para 35(c).

[50]Estonia (17 March 2003) CRC/C/15/Add.196, para 33(h); Timor-Leste (14 February 2008) CRC/C/TLS/CO/1, para 49(b); Guatemala (28 February 2018) CRC/C/GTM/CO/5-6, para 28; Sri Lanka (2 March 2018) CRC/C/LKA/CO/5-6, para 28(c); Spain (5 March 2018) CRC/C/ESP/CO/5-6, para 28(b); Norway (4 July 2018) CRC/C/NOR/CO/5-6, para 21(a)(i).

[51]Finland (16 October 2000) CRC/C/15/Add.132, 36; Chile (23 April 2007) CRC/C/CHL/CO/3, para 45; Japan (20 June 2010) CRC/C/JPN/CO/3, paras 39–40; Nigeria (21 June 2010) CRC/C/NGA/CO/3-4, para 51(c); Uzbekistan (10 July 2013) CRC/C/UZB/CO/3-4, para 48(f).

[52]Poland (30 October 2015) CRC/C/POL/CO/3-4, paras 33(f)–(g); Bulgaria (21 November 2016) CRC/C/BGR/CO/3-5, para 35(f).

[53]China (24 November 2005) CRC/C/CHN/CO/2, para 53(e).

[54]Ethiopia (1 November 2006) CRC/C/ETH/CO/3, para 40; Kenya (19 June 2007) CRC/C/KEN/CO/2, 41(b); Portugal (25 February 2014) CRC/C/PRT/CO/3-4, para 44.

[55]Rwanda (1 July 2004) CRC/C/15/Add.234, para 42; Nicaragua (21 September 2005) CRC/C/15/Add.265, para 39; Lebanon (8 June 2006) CRC/C/LBN/CO/3, para 45; Djibouti (7 October 2008) CRC/C/DJI/CO/2, para 44; Ecuador (2 March 2010) CRC/C/ECU/CO/4, para 53; Mauritius (27 February 2015) CRC/C/MUS/CO/3-5, para 46; Democratic Republic of Congo (28 February 2017) CRC/C/COD/CO/3-5, para 33.

[56]Italy (18 March 2003) CRC/C/15/Add.198, paras 27–28; Kazakhstan (10 July 2003) CRC/C/15/Add.213, para 46; Oman (29 September 2006) CRC/C/OMN/CO/2, paras 31–32; Ireland (1 March 2016) CRC/C/IRL/CO/3-4, para 34.

the right to privacy guaranteed in Article 16.[57] Finally, best interests have occasionally appeared in the context of violence against children, including sexual violence.[58]

Among socio-economic rights, some of the most specific recommendations concern the right to health. Alongside more structural health-related issues, the focus has often been on adolescent health.[59] The right to education has also occasionally been connected to best interests.[60] The Committee has often expressed concern about the adequacy of measures to ensure the effective implementation of socio-economic rights in general in light of articles 2, 3 and 4. Adequate measures are especially important for vulnerable groups.[61] The aim of preventing poverty is implicit in several concluding observations and explicit in some.[62]

Traces of a definition

Despite the many contexts in which it appears, the concept of the best interests of the child is rarely defined in the concluding observations. Nevertheless, some traces of a definition can be found. The Committee has characterised the right expressed in Article 3 as a positive obligation[63] and as directly applicable in courts of law.[64] Furthermore, the Committee has indicated that an evaluation of how children's rights and interests are affected should also be conducted in cases indirectly affecting children.[65] These guidelines are in line with the views expressed in the general comment on best interests, to which newer concluding observations often refer.

The central position of best interests in the paradigm shift from welfare-based to rights-based thinking underlies several concluding observations.[66] The Committee's argumentation underlines the connection between best interests and human rights: children are not objects[67] or 'immature adults',[68] and perceiving children as subjects of rights is the 'main thrust of the Convention'.[69] The Committee has explained that '[t]he best interests of the child is a guiding principle in the implementation of the Convention',[70] emphasising the relevance of Article 3 for the whole UNCRC. Best interests and other UNCRC general principles are sometimes presented as guiding principles in changing circumstances, be it a legislative reform of the juvenile justice system[71] or the transition of a socialist country to a market economy.

[57]Mozambique (4 November 2009) CRC/C/MOZ/CO/2, paras 42–43; New Zealand (21 October 2016) CRC/C/NZL/CO/5, para 20(a).
[58]Brazil (3 November 2004) CRC/C/15/Add.241, para 49(c); Sao Tome and Principe (29 October 2013) CRC/C/STP/CO/2-4, para 31(d).
[59]Malta (28 June 2000) CRC/C/15/Add.129, paras 21–22; Cook Islands (22 February 2012) CRC/C/COK/CO/1, para 50(f); Venezuela (13 October 2014) CRC/C/VEN/CO/3-5, para 57(b); Panama (28 February 2018) CRC/C/PAN/CO/5-6, para 31(e).
[60]Japan (24 June 1998) CRC/C/15/Add.90, paras 22–43; Sweden (10 May 1999) CRC/C/15/Add.101, para 20; France (30 June 2004) CRC/C/15/Add.240, para 25; Cyprus (24 September 2012) CRC/C/CYP/CO/3-4, para 45(c).
[61]Guatemala (7 June 1996) CRC/C/15/Add.58, para 16.
[62]Switzerland (13 June 2002) CRC/C/15/Add.182, para 47.
[63]Ireland (1 March 2016) CRC/C/IRL/CO/3-4, para 29.
[64]Canada (20 June 1995) CRC/C/15/Add.37, para 23; France (22 June 2009) CRC/C/FRA/CO/4, para 35.
[65]Lithuania (17 March 2006) CRC/C/LTU/CO/2, para 30; Burkina Faso (9 February 2010) CRC/C/BFA/CO/3-4, para 29.
[66]Panama (21 December 2011) CRC/C/PAN/CO/3-4, paras 35–36.
[67]Dominican Republic (21 February 2001) CRC/C/15/Add.150, para 25.
[68]Republic of Korea (13 February 1996) CRC/C/15/Add.51, para 12.
[69]Maldives (13 July 2007) CRC/C/MDV/CO/3, para 41.
[70]Pakistan (25 April 1994) CRC/C/15/Add.18, para 26.
[71]Sri Lanka (21 June 1995) CRC/C/15/Add.40, para 40.

Following this rights-based understanding, it is logical that the Committee often expresses concern about misunderstandings of the best interests principle.[72] Misunderstandings may exist despite legislative efforts and decisions to improve the welfare of children.[73] If legislation ' … does not fully consider children as persons entitled to individual rights', it does not integrate best interests in the meaning of the UNCRC.[74] The Committee has often reproached states parties for poorly implementing its recommendations.[75] Several factors may contribute to poor implementation, including attitudes and customary and religious interpretations.[76] Best interests may be used to justify practices that breach children's rights, such as child marriages, the denial of paternity tests, or unjust removals from home.[77] Another concern, especially in newer concluding observations, is that the interests of families, communities or adults often prevail over the best interests of the child.[78] The Committee has critically flagged up the lack of the principle's application[79] and urged states to include more detailed information on the implementation of Article 3 in their next report.[80]

Best interests are often characterised by what they are not rather than what they are. Best interests are different from well-being,[81] and they cannot be equated with 'welfare',[82] 'development',[83] immediate protection of the child,[84] 'interests',[85] 'legitimate interests'[86] or needs and views,[87] even though taking children's views into account alongside best interests is often recommended. Some dictions imply that best interests cannot be equated with rights either.[88] On the other hand, the Committee has urged ' … particular attention to the rights recognised in the Convention, including the principle of the best interests of the child'.[89]

The importance of family unity is visible in several contexts, including alternative care, migrants and imprisoned parents. In addition to family unity, the rare substantive advice for assessing best interests is context-specific, such as taking into consideration the best interests of migrant workers' children when repatriating workers with their children to their country of origin. In this context, the Committee has advised states to

[72]Finland (3 August 2011) CRC/C/FIN/CO/4, para 27; Colombia (6 March 2015) CRC/C/COL/CO/4-5, para 21; Serbia (7 March 2017) CRC/C/SRB/CO/2-3, para 24.
[73]Libya (4 July 2003) CRC/C/15/Add.209, para 7; Serbia (20 June 2008) CRC/C/SRB/CO/1, para 27.
[74]Cuba (3 August 2011) CRC/C/CUB/CO/2, para 26.
[75]Italy (31 October 2011) CRC/C/ITA/CO/3-4, para 7; Lesotho (25 June 2018) CRC/C/LSO/CO/2, para 4.
[76]Micronesia (4 February 1998) CRC/C/15/Add.86, para 22; Russian Federation (23 November 2005) CRC/C/RUS/CO/3, para 26.
[77]Argentina (21 June 2010) CRC/C/ARG/CO/3-4, para 35; Israel (4 July 2013) CRC/C/ISR/CO/2-4, para 31; Saudi Arabia (25 October 2016) CRC/C/SAU/CO/3-4, para 19; Mauritania (26 November 2018) CRC/C/MRT/CO/3-5, para 19(d).
[78]Denmark (10 July 2001) CRC/C/15/Add.151, para 28; Niue (26 June 2013) CRC/C/NIU/CO/1, para 26; Italy (28 February 2019) CRC/C/ITA/CO/5-6, para 16(b); Cabo Verde (27 June 2019) CRC/C/CPV/CO/2, para 28.
[79]Eritrea (23 June 2008) CRC/C/ERI/CO/3, para 28; Panama (21 December 2011) CRC/C/PAN/CO/3-4, para 64.
[80]China (24 November 2005) CRC/C/CHN/CO/2, paras 35–36; Turkey (20 July 2012) CRC/C/TUR/CO/2-3, para 31.
[81]Switzerland (26 February 2015) CRC/C/CHE/CO/2-4, para 26; Marshall Islands (27 February 2018) CRC/C/MHL/CO/3-4, para 25(c).
[82]Gambia (20 February 2015) CRC/C/GMB/CO/2-3, para 31; Saint Vincent and the Grenadines (13 March 2017) CRC/C/VCT/CO/2-3, para 24.
[83]Bolivia (11 February 2005) CRC/C/15/Add.256, para 40; Romania (30 June 2009) CRC/C/ROM/CO/4, para 91(g).
[84]North Macedonia (23 June 2010) CRC/C/MKD/CO/2, para 44(a).
[85]Lithuania (30 October 2013) CRC/C/LTU/CO/3-4, para 18.
[86]Armenia (8 July 2013) CRC/C/ARM/CO/3-4, para 20; Kyrgyzstan (7 July 2014) CRC/C/KGZ/CO/3-4, para 20.
[87]Tajikistan (29 September 2017) CRC/TJK/CO/3-5, para 26(b).
[88]Burundi (19 October 2010) CRC/C/BDI/CO/2, para 47(c).
[89]Mongolia (21 September 2005) CRC/C/15/Add.264, para 34(c).

> … take into account the totality of the circumstances, including paying attention to issues like the fact that the child is born in the State party, the length of the stay of the child on the State party's territory, the years of education enjoyed in the State party and the need to not separate the child from her/his parents.[90]

Six Cross-Cutting Themes: Measures States Need to Take

Legislative measures

In addition to the various contexts, six cross-cutting themes emerge regarding how states should act to implement Article 3. The first prominent recommendation is to integrate the best interests principle into national legislation.[91] The Committee sees a direct relationship between legislative incorporation and the successful application in practice.[92] Using the UNCRC as an interpretive tool alone is insufficient:[93] the concept should be explicitly included in all legislation with an impact on children and, preferably, in the constitution too.[94]

Moreover, states should develop clear criteria for assessing best interests[95] and include these criteria in legislation as well.[96] The Committee has not expressly guided states on the contents of such criteria in its concluding observations, but some implicit guidelines surface. Substantively, it is not enough to assess only children's physical safety; emotional and psychological needs should also be assessed.[97] As discussed earlier, family unity is emphasised in several contexts. Concerning the procedural or institutional side, best interests should be separated from other interests and independently assessed.[98] The Committee has criticised legislation providing automatic solutions, which shows that individual assessment of every case is important.[99] The Committee has also been concerned about the space allocated to children's interests. A general human rights ombudsman, for instance, may be unable to address them sufficiently.[100]

Considering best interests in policies and decision-making

The second cross-cutting theme is that best interests should not 'remain on paper'.[101] The Committee has often emphasised that including best interests in legislation is insufficient if the principle is not systematically considered in practice, for example in decisions concerning vulnerable children.[102] The consideration of best interests should not happen sporadically.[103]

[90]Malaysia (25 June 2007) CRC/C/MYS/CO/1, para 88.
[91]Barbados (24 August 1999) CRC/C/15/Add.103, para 8; Côte d'Ivoire (12 July 2019) CRC/C/CIV/CO/2, para 21.
[92]Panama (21 December 2011) CRC/C/PAN/CO/3-4, para 35; Syrian Arab Republic (9 February 2012) CRC/C/SYR/CO/3-4, para 35.
[93]Ireland (4 February 1998) CRC/C/15/Add.85, para 25.
[94]Guyana (26 February 2004) CRC/C/15/Add.224, paras 25–26; Kenya (21 March 2016) CRC/C/KEN/CO/3-5, para 4(h); Malta (26 June 2019) CRC/C/MLT/CO/3-6, para 20(a).
[95]Norway (4 July 2018) CRC/C/NOR/CO/5-6, para 13(a); Cabo Verde (27 June 2019) CRC/C/CPV/CO/2, para 28.
[96]France (22 June 2009) CRC/C/FRA/CO/4, para 36(a); Monaco (29 October 2013) CRC/C/MCO/CO/2-3, para 24.
[97]Russian Federation (25 February 2014) CRC/C/RUS/CO/4-5, para 26(b).
[98]Tonga (2 July 2019) CRC/C/TON/CO/1, para 23.
[99]Luxembourg (31 March 2005) CRC/C/15/Add.250, paras 34–35; Slovenia (8 July 2013) CRC/C/SVN/CO/3-4, para 47(d); Bahrain (27 February 2019) CRC/C/BHR/CO/4-6, para 33.
[100]Tajikistan (5 February 2010) CRC/C/TJK/CO/2, para 12.
[101]El Salvador (17 February 2010) CRC/C/SLV/CO/3-4, para 30(a).
[102]Sao Tome and Principe (1 July 2004) CRC/C/15/Add.235, para 24; Belgium (28 February 2019) CRC/C/BEL/CO/5-6, para 17.
[103]Ghana (17 March 2006) CRC/C/GHA/CO/2, paras 28–29.

The Committee's overall stance makes it clear that the list of contexts presented earlier is not exhaustive. States should incorporate best interests in all relevant policies, programmes and projects.[104] A common recommendation is integrating, interpreting and applying best interests in all legislative, administrative and judicial proceedings.[105] Furthermore, legal reasoning should be based on best interests and specify the criteria used to assess and determine them.[106] Actors that need to consider best interests include the legislative, executive and judicial branches of government,[107] national, regional and municipal actors, and courts, schools, and other institutions.[108] In older concluding observations, the Committee has often emphasised that the general principles – including Article 3 – should guide planning and policymaking.[109] The Committee has also recommended developing a comprehensive strategy for children.[110]

Cooperation

The third cross-cutting theme is cooperation, both national and international. The Committee has recommended cooperation with civil society[111] and cooperation between budgeting authorities and governmental bodies and institutions handling children's issues. Cooperation appears to be considered crucial; in budgeting, for example, cooperation is deemed necessary to ensure that the decisions have '… a direct and positive impact on the budget'.[112]

International cooperation is frequently recommended. The Committee has encouraged states to ratify other conventions, for example the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, indicating that ratifying it will help ensure the best interests of the child.[113] The importance of fully ratifying the UNCRC is a recurring theme: the Committee has expressed that specific reservations to the UNCRC raise questions about compatibility of the reservations with best interests.[114] Promoting bilateral agreements has sometimes been presented as a way to influence the behaviour of states not parties to certain conventions.[115] The Committee has also recommended providing diplomatic and consular assistance,[116] as well as better coordination between national authorities and international agencies that provide technical assistance in monitoring the UNCRC's implementation.[117] Another recommendation is that states seek assistance from international organisations, for example UNICEF or WHO.[118] In the context of preventing disappearances of unaccompanied asylum-seeking children,

[104]Italy (28 February 2019) CRC/C/ITA/CO/5-6, para 16(a); Côte d'Ivoire (12 July 2019) CRC/C/CIV/CO/2, para 22.
[105]Guinea (28 February 2019) CRC/C/GIN/CO/3-6, para 18(a); Botswana (26 June 2019) CRC/C/BWA/CO/2-3, paras 23–24.
[106]Canada (6 December 2012) CRC/C/CAN/CO/3-4, para 35; Malta (18 June 2013) CRC/C/MLT/CO/2, para 31; Chile (30 October 2015) CRC/C/CHL/CO/4-5, para 26.
[107]Chad (12 February 2009) CRC/C/TCD/CO/2, para 34; Germany (25 February 2014) CRC/C/DEU/CO/3-4, para 26.
[108]Togo (31 March 2005) CRC/C/15/Add.255, para 29; Guatemala (25 October 2010) CRC/C/GTM/CO/3-4, para 43.
[109]Lithuania (21 February 2001) CRC/C/15/Add.146, para 20.
[110]Bangladesh (18 June 1997) CRC/C/15/Add.74, para 34.
[111]Seychelles (23 January 2012) CRC/C/SYC/CO/2-4, para 31.
[112]Honduras (18 June 1997) CRC/C/15/Add.75, para 35.
[113]Mozambique (4 November 2009) CRC/C/MOZ/CO/2, para 6(f).
[114]Slovenia (30 October 1996) CRC/C/15/Add.65, para 10.
[115]Austria (7 May 1999) CRC/C/15/Add.98, para 19.
[116]Canada (27 October 2003) CRC/C/15/Add.215, para 29.
[117]Jamaica (15 February 1995) CRC/C/15/Add.32, para 19.
[118]Peru (22 February 2000) CRC/C/15/Add.120, para 22; Bhutan (9 July 2001) CRC/C/15/Add.157, paras 53(d)-(e); Guatemala (9 July 2001) CRC/C/15/Add.154, para 45.

the Committee has even suggested applying the Dublin II Regulation only '… in cases where it is in keeping with the child's best interest'.[119]

Awareness-raising and training

The fourth cross-cutting theme is awareness-raising. The Committee has often expressed concern about low awareness of the significance of the best interests principle.[120] As it is perceived as a tool to counteract harmful interpretations of best interests, awareness-raising is connected to the paradigm shift of children as rights-holders.[121] The Committee has recommended awareness-raising in the community (including among children themselves) through media campaigns.[122] Awareness-raising has been proposed as a cure to both reluctant attitudes towards penalising perpetrators of sexual abuse[123] as well as towards corporal punishment, which, especially in older concluding observations, has been a frequent theme.[124] Disseminating criteria to assess best interests to relevant actors and the public has been recommended.[125] In concluding observations given after 2013, the Committee has recommended dissemination of its general comment concerning best interests.[126]

The training of professionals, another frequent recommendation, is closely related to awareness-raising. The Committee has expressed concern about misunderstandings related to the concept among the judiciary and professionals working with and for children, making regular training necessary.[127] The Committee has called for procedures combining knowledge from different sectors: child protection authorities, for example, should participate in procedures for determining the best interests of unaccompanied and separated children and should train border officials on children's rights and child-sensitive procedures.[128]

Budgeting and resources

The Committee takes a threefold approach to the relationship between best interests and resources, the fifth cross-cutting theme. First, the implementation of best interests should be guaranteed regardless of available resources.[129] Second, adequate and consistent resources are a prerequisite for effectively implementing the UNCRC, including Article 3.[130] The third aspect is procedural: best interests must be considered when allocating resources. The concluding observations display a constant worry that this is not the

[119]Denmark (7 April 2011) CRC/C/DNK/CO/4, para 58(b).
[120]Algeria (12 October 2005) CRC/C/15/Add.269, para 29.
[121]Liberia (13 December 2012) CRC/C/LBR/CO/2-4, para 36; Slovakia (20 July 2016) CRC/C/SVK/CO/3-5, para 17(c).
[122]Madagascar (8 March 2012) CRC/C/MDG/CO/3-4, para 26.
[123]Holy See (25 February 2014) CRC/C/VAT/CO/2, para 29; Maldives (14 March 2016) CRC/C/MDV/CO/4-5, paras 28–29.
[124]United Kingdom of Great Britain and Northern Ireland (15 February 1995) CRC/C/15/Add.34, para 31; Czech Republic (21 October 1997) CRC/C/15/Add.81, para 18.
[125]Congo (25 February 2014) CRC/C/COG/CO/2-4, para 31; Hungary (14 October 2014) CRC/C/HUN/CO/3-5, para 22.
[126]Italy (28 February 2019) CRC/C/ITA/CO/5-6, para 16(c).
[127]Eritrea (23 June 2008) CRC/C/ERI/CO/3, para 29; Sweden (26 June 2009) CRC/C/SWE/CO/4, para 28; Montenegro (22 June 2018) CRC/C/MNE/CO/2-3, para 23.
[128]Italy (28 February 2019) CRC/C/ITA/CO/5-6, para 36(h); Malta (26 June 2019) CRC/C/MLT/CO/3-6, para 42(e).
[129]Indonesia (18 October 1993) CRC/C/15/Add.7, para 13; Libya (4 July 2003) CRC/C/15/Add.209, para 19.
[130]Sierra Leone (24 February 2000) CRC/C/15/Add.116, para 14; Central African Republic (18 October 2000) CRC/C/15/Add.138, paras 30–31; Bosnia and Herzegovina (21 September 2005) CRC/C/15/Add.260, para 28.

case.[131] Geographical disparities in children's services, for instance, are problematic.[132] The Committee has often connected UNCRC general principles to Article 4 and recommended prioritising budgetary allocations to ensure the implementation of children's socio-economic rights to the maximum extent of available resources.[133]

In concluding observations since 2016, the Committee has frequently referred to its general comment on public budgeting[134] and recommended a children's rights approach in the budgeting processes. This means a systematic and transparent tracking system to assess '… how investments in a particular sector may serve the best interests of the child', ensuring that impact on girls versus boys, children in vulnerable situations and children of different ethnic groups is measured.[135] The Committee has also recommended undertaking impact assessments of best interests in budget cuts[136] and measuring the effects of budget cuts on children in relation to gender.[137] It has even recommended considering best interests when allocating subsidies to businesses that violate children's rights abroad.[138] Specific budgeting instructions are a recent phenomenon, although older concluding observations also connect best interests to allocating resources in a manner compliant with children's rights and to prioritising vulnerable groups.[139]

Monitoring

The sixth cross-cutting theme is monitoring, which is also evident in the context of budgeting and resources. Mandatory child rights impact assessments are an essential element in implementing Article 3.[140] While the Committee has recommended impact assessments in earlier concluding observations,[141] they are particularly underlined in recent ones. The Committee often recommends compulsory processes for *ex ante* and *ex post* impact assessments of laws and policies relevant to children, be they national legislation or regional or local initiatives.[142] The cumulative impact of social security and tax credit reforms, for instance, should be assessed and the reforms revised if necessary.[143] The Committee has also recommended conducting studies to examine the implementation of best interests in a specific context, for instance judicial and administrative cases.[144]

Overall, monitoring is a central theme in the concluding observations. It naturally applies to decisions; placements in special education, for instance, should be regularly

[131]Mexico (8 June 2006) CRC/C/MEX/CO/3, para 26; Democratic People's Republic of Korea (27 March 2009) CRC/C/PRK/CO/4, para 21; Austria (3 December 2012) CRC/C/AUT/CO/3-4, para 26.
[132]Iceland (13 February 1996) CRC/C/15/Add.50, para 24.
[133]Benin (12 August 1999) CRC/C/15/Add.106, para 11; Burundi (16 October 2000) CRC/C/15/Add.133, paras 18–19; Jamaica (4 July 2003) CRC/C/15/Add.210, para 18; Kazakhstan (10 July 2003) CRC/C/15/Add.213, para 18(a).
[134]Committee on the Rights of the Child, General Comment No. 19 on public budgeting for the realization of children's rights (art 4) (2016), CRC/C/GC/19.
[135]Sri Lanka (19 October 2010) CRC/C/LKA/CO/3-4, para 17(a); Holy See (25 February 2014) CRC/C/VAT/CO/2, para 18(b).
[136]Sweden (6 March 2015) CRC/C/SWE/CO/5, para 10(c).
[137]Mexico (3 July 2015) CRC/C/MEX/CO/4-5, para 14(d).
[138]Germany (25 February 2014) CRC/C/DEU/CO/3-4, paras 22–23.
[139]Nicaragua (20 June 1995) CRC/C/15/Add.36, para 32; Uruguay (11 October 1996) CRC/C/15/Add.62, para 20; Yemen (10 May 1999) CRC/C/15/Add.102, para 15.
[140]Sweden (6 March 2015) CRC/C/SWE/CO/5, paras 17(a) and 18(a).
[141]Nigeria (30 October 1996) CRC/C/15/Add.61, para 13; Bulgaria (24 January 1997) CRC/C/15/Add.66, para 26.
[142]Estonia (8 March 2017) CRC/C/EST/CO/2-4, para 20; Laos (1 November 2018) CRC/C/LAO/CO/3-6, para 15.
[143]United Kingdom of Great Britain and Northern Ireland (12 July 2016) CRC/C/GBR/CO/5, paras 71(c)–(d).
[144]Lebanon (7 June 1996) CRC/C/15/Add.54, para 35; Guinea-Bissau (13 June 2002) CRC/C/15/Add.177, para 25(b); Seychelles (23 January 2012) CRC/C/SYC/CO/2-4, para 37.

reviewed by an independent body.[145] The Committee has recommended establishing an effective national mechanism to appeal against decisions taken without a proper best interests assessment.[146] Children deprived of liberty should be held separately from adults and not in solitary confinement unless it is in their best interests and subject to court review,[147] which suggests that additional safeguards are needed to ensure compliance with the rights of the child. Monitoring is crucial for the whole UNCRC: the Committee has praised a procedure whereby a government annually reports to parliament on the implementation of the UNCRC, which ' … will contribute to emphasizing the importance of the principle of the best interests of the child'.[148]

Discussion

Several contexts

The purpose of this article is to understand how the Committee on the Rights of the Child views the concept of the best interests of the child in its main monitoring activity: the issuance of concluding observations based on state reports. Analysis of the concluding observations reveals two central aspects of this view. First, best interests arise in several recurring contexts. Second, six cross-cutting themes emerge that emphasise active state action. The findings are discussed in more detail in this section.

Although the study did not systematically analyse temporal trends, some developments are visible. Cynthia Price Cohen and Susan Kilbourne observed in 1998 that concluding observations had become increasingly detailed.[149] This trend has continued: compared to the 1990s, the concluding observations have become denser and the Committee now expands on best interests in multiple contexts. A partial explanation is that the Committee has more materials at its disposal today, including its own general comments, which are frequently referred to, especially the general comment concerning best interests.

Overall, the argumentation of the concluding observations has become more specific. Earlier, the focus was on a general requirement that the principle be taken into account in legislation and decision-making, and reference to best interests as part of a larger cluster of UNCRC articles was common.[150] Previously, the Committee referred generally to children in vulnerable situations, but in newer concluding observations it has started to address vulnerable groups—for instance, asylum-seeking children—separately. Such specific argumentation contributes to making visible children's different needs. In addition, the Committee's reporting guidelines have changed several times, which is also reflected in the structure of concluding observations.

Expectedly, best interests appear in the context of other UNCRC general principles. However, given the strong emphasis the Committee has placed on obtaining children's

[145]Czech Republic (4 August 2011) CRC/C/CZE/CO/3-4, para 62(f); Sierra Leone (1 November 2016) CRC/C/SLE/CO/3-5, para 14.
[146]Uruguay (5 March 2015) CRC/C/URY/CO/3-5, paras 25 and 26(c).
[147]Denmark (10 July 2001) CRC/C/15/Add.151, para 41; New Zealand (11 April 2011) CRC/C/NZL/CO/3-4, para 56(d).
[148]France (25 April 1994) CRC/C/15/Add.20, para 6.
[149]Cynthia Price Cohen and Susan Kilbourne, 'Jurisprudence of the Committee on the Rights of the Child: A Guide for Research and Analysis' (1998) 19 Michigan Journal of International Law 633, 646.
[150]Malawi (2 April 2002) CRC/C/15/Add.174, para 15; Switzerland (13 June 2002) CRC/C/15/Add.182, para 47.

views as a prerequisite for adequately assessing their best interests, the intersections between Articles 3 and 12 could be recognised even further.[151] Nevertheless, the variety of contexts in which children's participation must be guaranteed is well illustrated. In particular, the underlying focus on non-discrimination is interesting. Gender-based discrimination has long been emphasised, and the recent recommendation to assess the impact of budget measures on girls and boys separately underlines the need to address gender-based discrimination not only in obvious breaches of children's rights, such as child marriages, but also in structural questions in developed countries. The prominent position of gender-based discrimination in the concluding observations has been noted in earlier research: Kirsten Sandberg has argued that the Committee's recommendations on gender discrimination are often more concrete than those concerning other forms of discrimination.[152] The Committee seems to view non-discrimination as central to the UNCRC in general, as reflected in the breadth of recommendations related to children in vulnerable situations, even if non-discrimination is not always mentioned.

Family unity is one of the rare substantive themes that the Committee connects to best interests. Preventing separation from parents is clearly the main rule in the context of alternative care, but the Committee has often commented on the importance of family unity and maintaining ties in other areas, too, such as for the children of imprisoned parents, children with disabilities, children in street situations and migrant children. Prioritising family unity aligns with Article 9 and seems to imply that family unity is a key component of best interests.

While best interests have been connected to certain civil-political rights, it is hard to determine why the Committee has chosen the right to know one's origins and the right to privacy as central concerns. Why not, for instance, freedom of thought? Among the socio-economic rights where best interests are specifically addressed, the focus on the right to health can partly be explained by the reporting guidelines in which states are asked to report on the 'disability, basic health and welfare' cluster.[153] At the same time, several other socio-economic rights, such as the right to education – which is another cluster that reports are expected to address[154] – receive less attention in the context of best interests. Nevertheless, the enjoyment of socio-economic rights in general is an underlying theme and often mentioned in the context of resources.

The weight accorded to best interests also varies, as reflected in the Committee's language. In the context of adoption, where best interests have to be 'the paramount' consideration according to Article 21, best interests have been called 'the primary',[155] 'the paramount',[156] 'a paramount',[157] and 'of primary'[158] consideration. It is reasonable to assume that the varied terminology has more to do with incidental factors—understandable over the course of of years—than a profound change in the importance afforded to best interests considerations.

[151]See e.g. CRC/C/GC/14 (n 10) paras 43–45.
[152]Sandberg (n 4) 227–28.
[153]CRC/C/58/Rev.3, paras 34–37.
[154]Ibid. paras 38–39.
[155]Ecuador (26 October 2017) CRC/C/ECU/CO/5-6, para 31(b).
[156]Mongolia (12 July 2017) CRC/C/MNG/CO/5, para 28.
[157]New Zealand (21 October 2016) CRC/C/NZL/CO/5, para 29(b).
[158]Jamaica (10 March 2015) CRC/C/JAM/CO/3-4, para 41.

Along with analysing which areas the Committee connects to best interests, it is equally interesting to examine which rights or issues it does not connect to the concept. As Laura Lundy has observed, the recurring themes might not be the areas most in need of improvement.[159] Issues connected to best interests may reflect the fact that the Committee does not discuss all themes evenly rather than its understanding of best interests. Some issues do not receive much attention in the concluding observations collectively, as Jill Stein has found with regard to stateless children.[160] Not everything can be addressed in a 15- to 20-page document, of course, but it is important to be aware of deficient areas.

Some observations related to best interests seem obvious, such as criticising 24-hour kindergartens[161] or the fact that groups involved in a civil war 'have often disregarded the best interests of the child'.[162] If one makes a list of contexts and asks the Committee whether best interests have to be considered there, the Committee will likely answer in the affirmative. This is, of course, logical: according to Article 3(1), best interests have to be considered in all actions concerning children. Mentioning several contexts can be important in individual cases, but it does not add much to the interpretation of the best interests concept in general.

The omission of discussion around the meaning of best interests in the concluding observations is relatively unsurprising; the drafting documents of the UNCRC show that the concept was often addressed as if its meaning was clear to everyone.[163] Assuming that everyone knows what best interests mean may be a general—and problematic—tendency. Another problem is that the Committee's recommendations tend to be of a general nature. As Karl Hanson and Lundy have observed, the Committee often repeats the same formulations when it discusses Article 3(1) and other general principles.[164] Often these formulations do not offer detailed instructions for decision-makers, which complicates the process of implementing the recommendations. The general language may result partly from Article 3's indeterminate nature: Ursula Kilkelly and Lundy have proposed that the general nature of recommendations concerning Article 3 reflects the difficulties of assessing whether and to what extent the concept has been implemented.[165] The general language can also reflect the extent to which the concept is, or is not, addressed in the country reports and NGO shadow reports. As the concept is so comprehensive, countries can rarely reach a point at which the Committee is happy with its implementation in every area. Indeed, a recent qualitative analysis of concluding observations found that no state scored high in operationalising best interests, while 54 of 160 scored low.[166] At times, the Committee seems to recognise the difficulties that the indeterminacy of Article 3 causes for its implementation. Alternatively, not discussing the meaning of Article 3 may be a general tendency related to other articles too. In an analysis of the right to development in concluding observations,

[159]Lundy (n 4) 399–400.
[160]Stein (n 4).
[161]Mongolia (12 July 2017) CRC/C/MNG/CO/5, para 17(c).
[162]Sudan (18 October 1993) CRC/C/15/Add.10, para 8.
[163]Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 International Journal of Law, Policy and the Family 1, 10–11.
[164]Hanson and Lundy (n 5) 294.
[165]Ursula Kilkelly and Laura Lundy, 'Children's Rights in Action: Using the UN Convention on the Rights of the Child as an Auditing Tool' (2006) Child and Family Law Quarterly 331, 336–37.
[166]The KidsRights Index 2019, 4.

Noam Peleg has noted that the Committee does not clarify the meaning, scope, aims or added value of that right either.[167]

Emphasising the need to consider best interests in various contexts may also imply that the Committee sees best interests as a procedural obligation that has to be respected in decision-making. Seeing the obligation as a 'procedural rule' is one of the three functions that the Committee identified in the general comment on best interests.[168] In concluding observations, too, the Committee has on several occasions shown an understanding of best interests as a step to be followed:[169] proper application means '… systematically considering how children's rights and interests are or will be affected' by decisions and actions.[170] Indeed, many recommendations touch upon the need to consider best interests in various contexts, for example refugee status determination or medical decision-making. From the perspective of best interests as a procedural obligation, not discussing the concept's meaning appears more understandable: the Committee might see its role as identifying contexts where best interests are not sufficiently considered. The Committee views consistency as a central component of implementing Article 3 and has often expressed concern about uneven implementation.[171]

The Committee faces a difficult task in advising independent states on implementing their treaty obligations. The Committee can only do so much; the concise nature of concluding observations already limits the depth of the discussion. One can ask whether it is even justifiable to expect concluding observations to provide detailed instructions on interpreting indeterminate concepts. On the other hand, if the Committee does not guide the interpretation other than by providing general guidelines in general comments, does it actually transfer the responsibility of doing so to actors external to the UNCRC system? Does giving leeway to national authorities lead to increased respect for different cultures and legal systems, or to increased avoidance of the implementation of UNCRC obligations?

A 'governance architecture' for the best interests of the child

The second main finding, the focus on structural elements reflected in the cross-cutting themes, does not seem to be a new trend. Concerning early concluding observations, Cohen and Kilbourne have noted that the Committee tends to emphasise certain elements of the reporting guidelines, including legislative measures, coordinating implementation and monitoring of the UNCRC, and resources, training, coordination with NGOs, and publicity.[172] Sarah Spronk has found that two prominent themes in concluding observations regarding the right to health are budgeting and the training of professionals.[173] As this article shows, the Committee has continued to emphasise these elements.

When compared with the list of 'general measures of implementation' of the UNCRC as described in General Comment no. 5, it is clear that the list of cross-cutting themes is almost identical.[174] In this respect, the Committee has been consistent regarding what it

[167]Peleg (n 2) 140–141.
[168]CRC/C/GC/14 (n 10) para 6.
[169]Argentina (1 October 2018) CRC/C/ARG/CO/5-6, para 28(b).
[170]Burkina Faso (9 February 2010) CRC/C/BFA/CO/3-4, para 29.
[171]Spain (5 March 2018) CRC/C/ESP/CO/5-6, para 28(b), para 16.
[172]Cohen and Kilbourne (n 149) 647.
[173]Spronk (n 4) 124–30.
[174]Committee on the Rights of the Child, General Comment no 5: General measures of implementation of the Convention on the Rights of the Child (arts 4, 42, 44; paras 6, 9) (2003) CRC/GC/2003/5.

expects from states. Tara Collins has formulated the significance of general measures of implementation so that they shift attention to how efforts in protecting children's rights are carried out in addition to what is being done.[175] The measures required by the Committee show what a 'governance architecture' for children's rights should entail.[176] Ursula Kilkelly has found that varied national approaches to implementing the UNCRC have different advantages and that both legal and non-legal measures are needed.[177]

The Committee seems to be right in requiring legislative measures. A study showed that children's rights are better protected in countries where the UNCRC has a legal status.[178] Another study in a national context found that courts are more likely to consider best interests if the concept is included in national legislation.[179] As Conor O'Mahony has noted regarding constitutional protection of children's rights, the quality of the provisions is important as not all references to children create rights or guarantee enforceability.[180] Integrating the UNCRC in national legislation helps concretise the requirements of the UNCRC. National legislation often determines the order in which decision-makers consider various factors, which then affects or even determines the outcome of the case. The requirement of including criteria for assessment is reasonable from the point of view of legal certainty, though the Committee's own jurisprudence shows that creating criteria is challenging. In the general comment on best interests, the Committee sketched a non-exhaustive list of elements to be taken into account when considering best interests, but the general comment's guidelines for balancing rights are not detailed. The second cross-cutting theme, considering best interests in policy-making and individual decisions, is coherent with the basic idea of the human rights system, which is to implement rights primarily at the domestic level. The broad list of actors that the Committee sees as responsible for taking best interests into account in their decisions reflects the comprehensive nature of Article 3(1): the obligation to consider best interests does not apply only to public actors but stretches to the private sphere. The emphasis on training of professionals is logical, too.

Some of the Committee's recommendations related to cooperation are far-reaching, such as the recommendation to ratify other treaties.[181] Michael O'Flaherty has proposed that the non-binding nature of concluding observations enables treaty bodies to make more adventurous suggestions to advance the enjoyment of human rights; at the same time, making recommendations extraneous to the actual treaty obligations underlines the non-binding nature of concluding observations.[182] It can be argued, however, that

[175]Tara M. Collins, 'The General Measures of Implementation: Opportunities for Progress with Children's Rights' (2019) 23 The International Journal of Human Rights 338.

[176]Tara Collins and Lisa Wolff, 'Work in Progress: Twenty-five Years of the Convention on the Rights of the Child: The General Measures of Implementation Across the Globe' (2014) 1 Canadian Journal of Children's Rights 85, 86; expression 'governance architecture' was first used by UNICEF, Canadian UNICEF Committee, It's Time for a National Children's Commissioner for Canada (2010) 5.

[177]Ursula Kilkelly, 'The UN Convention on the Rights of the Child: Incremental and Transformative Approaches to Legal Implementation' (2019) 23 The International Journal of Human Rights 323.

[178]Laura Lundy, Ursula Kilkelly and Bronagh Byrne, 'Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review' (2013) 21 International Journal of Children's Rights 442.

[179]Milka Sormunen, '"In All Actions Concerning Children"? Best Interests of the Child in the Case Law of the Supreme Administrative Court of Finland' (2016) 24 The International Journal of Children's Rights 155.

[180]Conor O'Mahony, 'Constitutional Protection of Children's Rights: Visibility, Agency and Enforceability' (2019) 19 Human Rights Law Review 401, 402.

[181]See also CRC/GC/2003/5 (n 174) para 17, where the Committee states that it 'often encourages them [states] to consider ratifying other relevant international instruments'. In the concluding observations, the Committee has directly recommended ratifying.

[182]Michael O'Flaherty, 'Towards Integration of United Nations Human Rights Treaty-Body Recommendations: The Rights-Based Approach Model' (2006) 24 Netherlands Quarterly of Human Rights 589, 592.

the recommendations are not so far-reaching because they flow from the UNCRC. Article 11 provides that to prevent illicit transfer and the non-return of children, '… States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements'. As Karin Arts has observed, international cooperation appears in the UNCRC preamble as well as in several substantive provisions; Article 4 on general implementation measures calls for international cooperation too.[183] The overall focus on active measures in the concluding observations seems to result partly from UNCRC provisions in addition to the reporting guidelines and general measures of implementation. The focus on awareness-raising can be seen as a logical follow-up to Article 42 on the duty of states to raise awareness about UNCRC provisions.

When analysing all the cross-cutting themes together, the central observation is that the Committee focuses on structural elements in implementing Article 3(1). In this sense, the Committee has created a 'governance architecture'[184] for the best interests of the child. The Committee's approach to the implementation of best interests can be seen as part of a broader trend towards a 'domestic institutionalisation' of human rights where domestic structures are seen to play a key role in implementing human rights norms.[185]

An interesting question is whether the Committee's focus on active measures has implications for the division between civil-political and socio-economic rights in the UNCRC. Does the emphasis on an active state imply that socio-economic rights are more relevant than civil-political rights in the context of best interests? Best interests and socio-economic rights have been discussed together especially in the context of budgeting and resources. The focus on socio-economic rights can be interpreted to convey an understanding of best interests as a positive obligation, which could help explain why the concept does not function well when rights are limited. The Committee has sometimes expressly characterised Article 3 as a positive obligation. On the other hand, the Committee has underlined the indivisible nature of the UNCRC and expressed concern at insufficient attention paid to the relationship between general principles and the implementation of all UNCRC articles, including civil-political rights.[186] Many recommendations are connected to more than one right, which underlines indivisibility. It is also important to note that civil-political rights require active measures, too.[187] Additionally, many of the cross-cutting themes are not specific to socio-economic rights but rather are general structural measures relevant for all human rights.

One might argue that the focus on concrete state action is obvious because the purpose of concluding observations is to give states advice on how to better implement their treaty obligations. It is therefore questionable how much the emphasis on the structural level is related to the nature of the best interests obligation as such and how much to the Committee's role and working methods. The emphasis on active measures in the reporting guidelines and General Comment no. 5 is certainly visible in the concluding observations. One needs to keep in mind, however, that the general comment on best interests was issued only in 2013. Before this, concluding observations were the main way for the

[183]Karin Arts, 'Twenty-Five Years of the United Nations Convention on the Rights of the Child: Achievements and Challenges' (2014) 61 Netherlands International Law Review 267, 281–82.
[184]Collins and Wolff (n 176) 86.
[185]Steven LB Jensen, Stéphanie Lagoutte and Sébastien Lorion, 'The Domestic Institutionalisation of Human Rights: An Introduction' (2019) 37 Nordic Journal of Human Rights 165.
[186]Venezuela (2 November 1999) CRC/C/15/Add.109, para 12; Portugal (9 December 2019) CRC/C/PRT/CO/5-6, para 4.
[187]See e.g. Human Rights Committee, General Comment no 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004) CCPR/C/21/Rev.21/Add.13.

Committee to communicate its views to states. It is, therefore, reasonable to expect concluding observations to contain detailed criteria on the content of treaty obligations alongside the structural recommendations, especially before 2013 but also afterwards to concretise the interpretive guidance of the general comment. As this article shows, however, this clarification of the concept has not occurred.

Conclusion

Analysing the concept of the best interests of the child in the concluding observations of the Committee on the Rights of the Child shows that while the Committee discusses best interests in several contexts, it gives little guidance for defining the concept. Instead, the Committee focuses on describing what kind of active measures states need to take to implement the obligation to consider the best interests of the child. This article has identified six cross-cutting themes that are visible in the contexts studied: legislative measures, integration in practices, cooperation, awareness-raising and training, budgeting, and monitoring.

Composing a definition of best interests applicable in all circumstances would be an impossible task. The Committee's focus on active measures instead of a definition is nevertheless interesting. As this article has suggested, this focus can be interpreted to convey that the Committee understands UNCRC Article 3(1) as a positive obligation. Most importantly, the concluding observations seem to suggest that the best way of implementing Article 3(1) is to create structures that advance the implementation of human rights in general. It is likely that the Committee sees other UNCRC obligations as requiring similarly active measures, as the cross-cutting themes correspond to the general measures of implementation identified by the Committee. Future research is needed on the impact of domestic institutionalisation of human rights on the implementation of children's rights as well as on the positive and negative obligations associated with the concept of the best interests of the child.

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